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ARGUED AND DETERMINED

IN THE COURTS OF ENGLAND AND IRELAND.

EDITED BY

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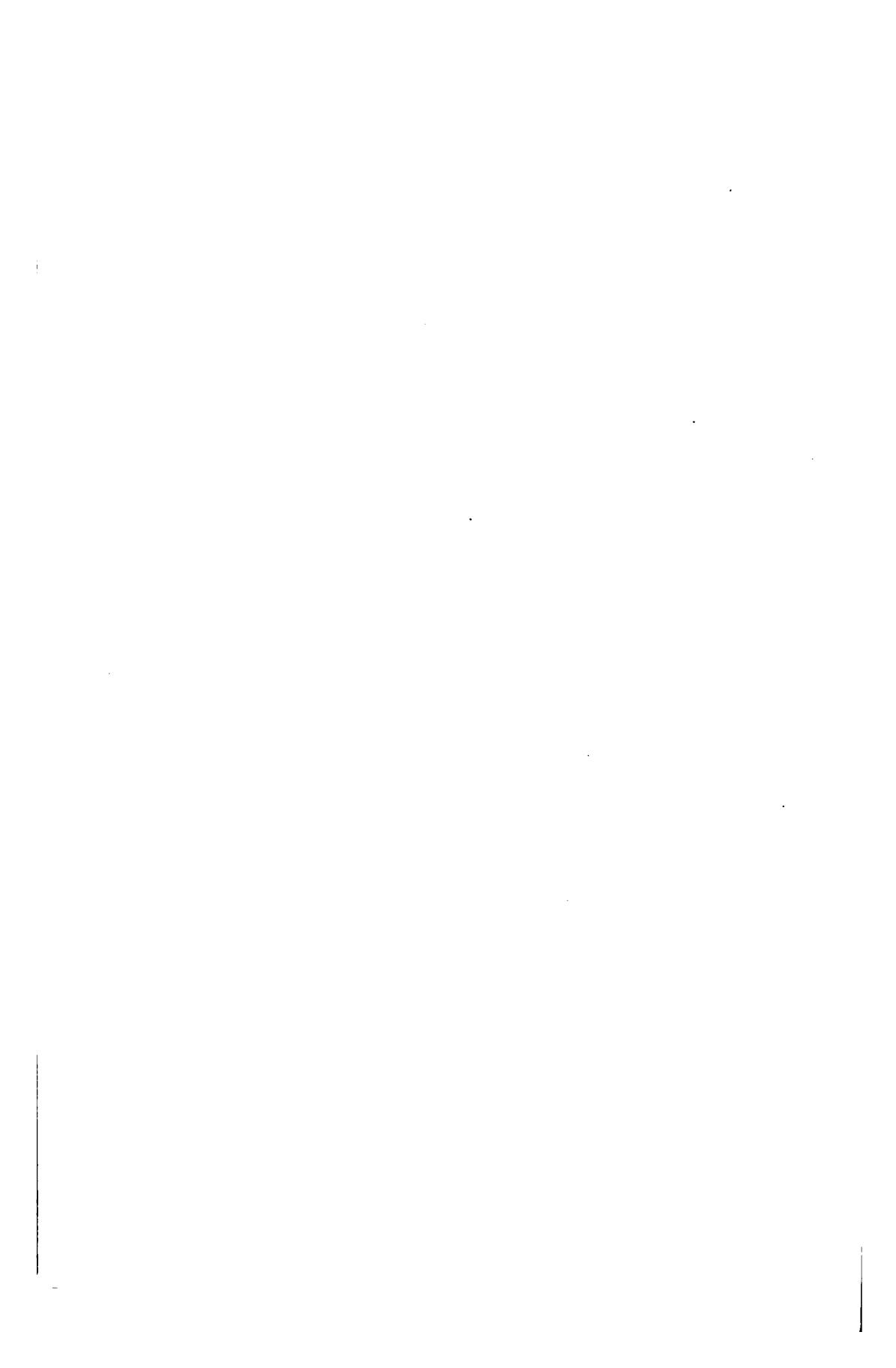
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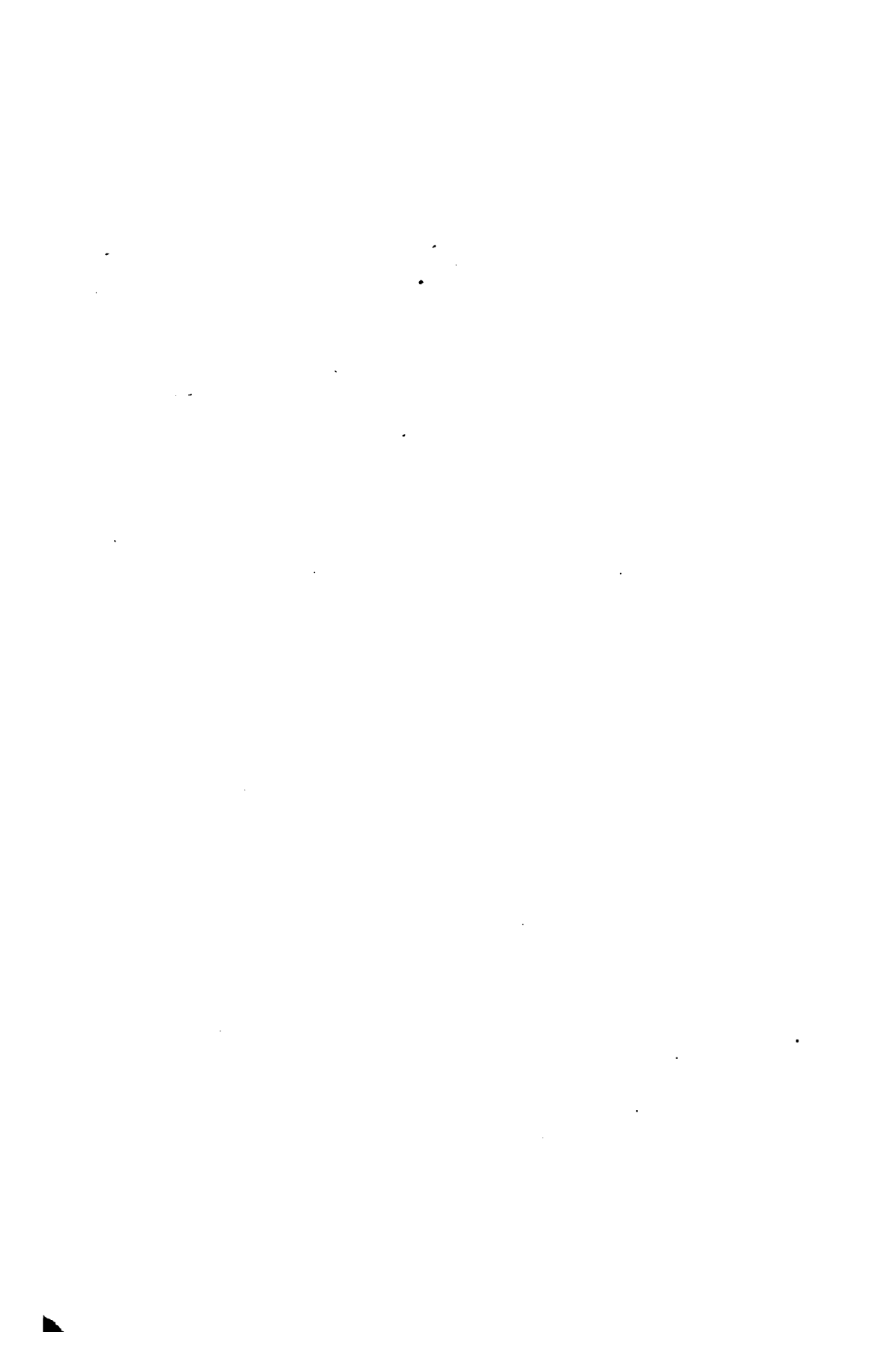
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REPORTS
OF
Criminal Law Cases.

QUEEN'S BENCH DIVISION.

February 10 and 13, 1890.

(Before CAVE and SMITH, JJ.)

STUBBS v. THE DIRECTOR OF PUBLIC PROSECUTIONS. (a)

Private prosecution—Charge dismissed—Prosecutor bound over—Bill preferred by prosecutor—True bill—Case undertaken by Public Prosecutor—Acquittal—Costs of defendants—22 & 23 Vict. c. 17—30 & 31 Vict. c. 35, s. 2—42 & 43 Vict. c. 22, s. 7.

It is provided by 30 & 31 Vict. c. 35, s. 2, that when an indictment is preferred under 22 & 23 Vict. c. 17, and the person accused is acquitted, the court may order the prosecutor or other person by or at whose instance such indictment shall have been preferred to pay the costs of the accused person.

42 & 43 Vict. c. 22, s. 7, enacts that, if any person is bound over to prosecute, or has given security for costs, he shall, upon the Director of Public Prosecutions undertaking the case, be released from such obligation, and the Director of Public Prosecutions shall be liable to costs in lieu of such person.

Where a person, who was bound over to prosecute a charge under 22 & 23 Vict. c. 17, preferred a bill of indictment and a true bill was found, the Director of Public Prosecutions undertook the case, and the accused were acquitted. An order was made that the Director of Public Prosecutions should pay the costs of the persons acquitted.

Held, that the order was bad.

THE following case was agreed to by the parties for the purpose of raising the questions therein for the opinion of the court :—

1. At all the times hereinafter referred to the defendant was

(a) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

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1890.

*Practice—
Costs—Pri-
vate prosecu-
tion—Case
undertaken by
Public Prose-
cutor—Ac-
quittal of de-
fendants—
Liability of
Public Prose-
cutor—22 & 23
Vict. c. 17; 30
& 31 Vict. c.
35, s. 2; 42 &
43 Vict. c. 22,
s. 7.*

and still is holding the office of Solicitor for the Affairs of Her Majesty's Treasury within the meaning of the Prosecution of Offences Act, 1884.

2. In the month of November, 1885, one John Cubitt Gostling made a charge before an alderman of the city of London that the plaintiffs had committed the offence of a criminal conspiracy within the jurisdiction of the said alderman, and the said alderman, after hearing evidence, refused to commit or to bail the plaintiffs to be tried for the said offence.

3. Thereupon the said John Cubitt Gostling desired to prefer an indictment respecting the said offence, and the alderman, pursuant to 22 & 23 Vict. c. 17, took the recognisance of the said John Cubitt Gostling to prosecute the said charge, and transmitted such recognisance and the information and depositions to the Central Criminal Court in the same manner as he would have done in case he had committed the plaintiffs to be tried for such offence.

4. The said John Cubitt Gostling, at the sessions of the said court, held the 3rd day of May, 1886, preferred a bill of indictment for the said offence against the plaintiffs before the grand jury, who found a true bill.

5. The trial of the said indictment was adjourned to the subsequent sessions at the plaintiff's request. The defendant, on or before the 30th day of May, 1886, and after the finding of the said bill, as Director of Public Prosecutions under the Prosecution of Offences Acts, 1879 and 1884, and the regulations made thereunder, undertook the prosecution of the said indictment. The plaintiffs were tried at the session of the said court held on the 3rd day of August, 1886, before the Recorder of London, and were both acquitted.

6. The plaintiffs had not been committed to or detained in custody, or bound by recognisance to answer such indictment. The said John Cubitt Gostling gave no security for costs.

7. At the session of the said court held on the 13th day of September, 1886, the said Recorder made the following order :

Central Criminal Court to wit.—At the general session of Oyer and Terminer, and general session of the Delivery of the Queen's Gaol of Newgate and other prisons holden for the jurisdiction of the Central Criminal Court at the Justice-hall in the Old Bailey in the suburbs of the City of London on Monday, the 13th day of September, 1886. Whereas on the 7th day of April, 1886, one John Cubitt Gostling, under the provisions of the Act 22 & 23 Vict. c. 17, entered into recognisances in the sum of 200*l.* to prefer, or cause to be preferred, at the then next session of this court a bill of indictment against George Laurie Stubbs and Thomas Irving for conspiring to cheat and defraud the shareholders of a company called J. C. Gostling and Company Limited, of divers sums of money. And whereas the said bill of indictment was preferred by or at the instance of the said J. C. Gostling, and found by the grand jury at the session of this court held on the 3rd day of May in the year aforesaid. And whereas after the preferring of the said bill of indictment the Director of Public Prosecutions undertook the said prosecution under the provisions of the Prosecutions of Offences Act, 1879, which prosecution was thereupon and thereafter carried on by the said Director of Public Prosecutions. And whereas at the session of this court held on Tuesday, the 3rd day of August, 1886, the said George Laurie Stubbs and Thomas Irving were severally acquitted upon the said indictment. Now this court, in pursuance of the provisions of sect. 2 of the statute 30 & 31 Vict. c. 35, doth order

that the prosecutor or other person by or at whose instance the said indictment was preferred do pay unto the said George Laurie Stubbs and Thomas Irving the sum of 164*l.* 17*s.*, being the just and reasonable costs, charges, and expenses of the said accused persons and their witnesses caused or occasioned by or consequent upon the preferring of such bill of indictment, and taxed by the proper officer of the court. Dated the 25th day of October, 1886.—H. K. AVORY, Deputy Clerk of the said Court.

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The defendant subsequently applied on the 24th day of November, 1886, to rescind the said order, but the Recorder refused such application.

8. At the session of the said court held on the 31st day of January, 1887, the said order was amended in the defendant's absence by ordering that the Director of Public Prosecutions (instead of the prosecutor or other person by or at whose instance the said indictment was preferred) should pay unto the said George Laurie Stubbs and Thomas Irving the sum of 164*l.* 17*s.*, being the just and reasonable costs, &c.

Practice—
Costs—Pri-
vate prosecu-
tion—Case
undertaken by
Public Prose-
cutor—Ac-
quittal of de-
fendants—
Liability of
Public Prose-
cutor—22 & 23
Vict. c. 17; 80
& 31 Vict. c.
35, s. 2; 42 &
43 Vict. c. 22,
s. 7.

The notice of an application for the above amendment was given on the 2nd day of January, 1890, to the defendant, who informed the plaintiffs' solicitor that he intended to take no steps with respect to the application, of which notice had been given by the said notice, and that he did not assent to such application.

9. The defendant has refused to pay the sum mentioned in the said order. The said orders was served on the defendant.

The questions for the opinion of the court are:—(1) Had the recorder power under the circumstances aforesaid to make the said orders or either of them? (2) Are the said orders or either of them made lawfully, and in accordance with 30 & 31 Vict. c. 35, s. 2, and the Prosecution of Offences Acts, 1879 and 1884? (3) Is the defendant now entitled to raise objection to the validity of the said orders or either of them? (4) Can the plaintiffs enforce in any manner against the defendant the payment of the sum ordered to be paid by the said orders or either of them?

The Vexatious Indictments Act (22 & 23 Vict. c. 17) provides as follows:

After the 1st day of September, 1859, no bill of indictment for any of the offences following, viz., conspiracy (*inter alia*) shall be presented to or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognisance to prosecute or give evidence against the person accused of such offence.

The Criminal Law Amendment Act, 1867 (30 & 31 Vict. c. 32), enacts:

Sect. 2. Whenever any bill of indictment shall be preferred to any grand jury, under the provisions of the Act 22 & 23 Vict. c. 17, against any person who has not been committed to or detained in custody, or bound by recognisance to answer such indictment, and the person accused thereby shall be acquitted thereon, it shall be lawful for the court before which such indictment shall be tried, in its discretion, to direct and order that the prosecutor or other person by or at whose instance such indictment shall have been preferred shall pay unto the accused person the just and reasonable costs, charges, and expenses of such accused person and his witness (if any) caused or occasioned by or consequent upon the preferring of such bill of indictment, to be taxed by the proper officer of the court.

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1890.

Practice—
Costs—Pri-
vate prosecu-
tion—Case
undertaken by
Public Prose-
cutor—Ac-
quittal of de-
fendants—
Liability of
Public Prose-
cutor—22 & 23
Vict. c. 17; 30
& 31 Vict. c.
35, s. 2; 42 &
43 Vict. c. 22,
s. 7.

The Prosecution of Offences Act, 1879 (42 & 43 Vict. c. 22), s. 2, is in the following terms :

Where any criminal proceeding is instituted, undertaken, or carried on by the Director of Public Prosecutions, such Director shall not be bound over to prosecute or conduct such proceedings, or required to give security for costs, and it shall not be necessary to bind over any person to prosecute or conduct such proceedings, and if any person is so bound over, or has given security for costs, he shall, upon the Director of Public Prosecutions undertaking the case, be released from such obligation, and the security shall be deemed to have been cancelled, and the Director of Public Prosecutions shall be liable to costs in lieu of such person.

The Prosecution of Offences Act, 1884 (47 & 48 Vict. c. 58), enacts :

Sect. 2. On and after the passing of this Act, all appointments made in pursuance of the principal Act are revoked, and the person for the time holding the office of Solicitor for the Affairs of Her Majesty's Treasury shall be Director of Public Prosecutions, and perform the duties and have the powers of such Director.

Finlay, Q.C. (with him *Willes Chitty*) for the plaintiffs.—The prosecutor was bound over to prosecute under the above provision of the Vexatious Indictments Act (22 & 23 Vict. c. 17). By 30 & 31 Vict. c. 32, the prosecutor, as he preferred the indictment, was liable to be ordered by the court to pay the costs of the accused persons, as they were acquitted. Then by the Prosecution of Offences Act, 1879 (42 & 43 Vict. c. 22), s. 2, when the Director of Public Prosecutions undertook the case, the original prosecutor was released from all liability to pay costs, and the Director of Public Prosecutions became liable to costs in lieu of the original prosecutor. The Director of Public Prosecutions, when he takes up a case, stands in the shoes of the original prosecutor, he becomes the effective person carrying on the prosecution, and the defendant is entitled to the security of that person.

Sir R. E. Webster, A.-G. (with him *R. S. Wright* and *Horace Avory*) for the defendant.—The Recorder had no power to alter in January the order which he had made the previous session. But, irrespective of that point, the defendant is not liable to pay these costs, and the order is bad. Prior to 1879 the Crown had the right to take up a prosecution at any time without any liability as to costs. It was intended by the Prosecution of Offences Act, 1879 (42 & 43 Vict. c. 22), s. 2, that when the Director of Public Prosecutions undertook a case the original prosecutor should be relieved from liability as to future costs, but not that the Director of Public Prosecutions should be liable for the costs incurred before he undertook the case, and that he should only be liable when security for costs had been given by the original prosecutor. It was never intended that a public officer acting under the directions of the Secretary of State or the Attorney-General should be liable for costs. The order as originally made was right, because the person who prefers the indictment is the person to be made liable.

Finlay in reply.

Feb. 13.—*Cave, J.*—The question raised in this case is, whether

the order of the Central Criminal Court of the 25th day of October, 1886, as amended by the order of the 31st day of January, 1887, is good. The Court thereby order the Director of Public Prosecutions to pay to Stubbs and Irving 164*l.* 17*s.* for costs. This order, it is said, is properly made under 30 & 31 Vict. c. 55, s. 2. In November, 1885, Gosling charged Stubbs and Irving with criminal conspiracy, but the alderman who heard the charge declined to commit them for trial. Thereupon Gosling entered into recognisances under 22 & 23 Vict. c. 17, and preferred a bill of indictment against Stubbs and Irving at the Central Criminal Court on the 3rd day of May, 1886, which bill was found by the grand jury. After the finding of the bill the Director of Public Prosecutions undertook the prosecution. On the 3rd day of August, 1886, Stubbs and Irving were tried and acquitted. Gosling had given no security for costs. On the 13th day of September, 1886, the Recorder made the order dated the 25th day of October, 1886, ordering the prosecutor or other person by or at whose instance the indictment was preferred to pay Stubbs' and Irving's costs, and on the 31st day of January, 1887, he amended the order by ordering the Director of Public Prosecutions to pay them. For the plaintiffs it was contended by Mr. Finlay that the order was good under 30 & 31 Vict. c. 35, s. 2, and 42 & 43 Vict. c. 22, s. 7. By 22 & 23 Vict. c. 17, intitled "An Act to prevent vexatious indictments for certain misdemeanours," no indictment for (amongst other offences) conspiracy is to be presented to any grand jury unless (among other alternatives) the prosecutor has been bound over to prosecute the accused. By 30 & 31 Vict. c. 35, s. 2, it is enacted that whenever any bill of indictment shall be preferred to any grand jury under the provisions of 22 & 23 Vict. c. 17, against any person who has not been committed or detained in custody or bound by recognisance to answer such indictment, and the person accused thereby shall be acquitted thereon, it shall be lawful for the court before which such indictment shall be tried in its discretion to direct and order that the prosecutor or other person by or at whose instance such indictment shall have been preferred, shall pay to the accused person his just and reasonable costs to be taxed. By 42 & 43 Vict. c. 22, s. 7, when any criminal proceeding is instituted, undertaken, or carried on by the Director of Public Prosecutions, such director shall not be bound over to prosecute or conduct such proceeding, or required to give security for costs, and it shall not be necessary to bail over any person to prosecute or conduct such proceeding, and if any person is so bound over or has given security for costs, he shall, upon the Director of Public Prosecutions undertaking the case, be released from such obligation, and the security shall be deemed to have been cancelled, and the Director of Public Prosecutions shall be liable to costs in lieu of such person. Now, it is clear that in this case no order such as that in question could have been made on the Director of Public Prosecutions under

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1890.

Practice—
Costs—Pri-
ate prosecu-
tion—Case un-
dertaken by
Public Prose-
cutor—Ac-
quittal of de-
fendants—Li-
ability of Public
Prosecutor—
22 & 23 Vict.
c. 17; 30 & 31
Vict. c. 35, s. 2;
42 & 43 Vict.
c. 22, s. 7.

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v.
THE DIRECTOR
OF PUBLIC
PROSECUTIONS.
—
1890.
—

*Practice—
Costs—Pri-
vate prosecu-
tion—Case un-
dertaken by
Public Prose-
cutor—Ac-
quittal of de-
fendants—
Liability of
Public Prose-
cutor—22 & 23
Vict. c. 17; 30
& 31 Vict. c.
35, s. 2; 42 &
43 Vict. c. 22,
s. 7.*

30 & 31 Vict. c. 35, alone, seeing that he was not the person by or at whose instance the indictment was preferred. 42 & 43 Vict. c. 22, s. 7, is quite general, and is not confined to cases coming under the Vexatious Indictments Act. Where the Director of Public Prosecutions undertakes the prosecution it releases the prosecutor, who has been bound over, from his obligation, and where he has given security for costs, the security is to be deemed to have been cancelled. So far, there is no indication of any intention to relieve the prosecutor from any costs he may be ordered to pay under 30 & 31 Vict. c. 35, s. 2. The concluding words of the clause are relied on for this purpose. They are: "and the Director of Public Prosecutions shall be liable to costs in lieu of such person." Looking, however, at the grammatical construction, I think these words must be read to impose no more liability on the Director of Public Prosecutions than that from which the original prosecutor is relieved by the preceding words; that is, the costs for which he is liable under his security. But for the words "the Director of Public Prosecutions shall be liable to costs in lieu of such person," no one would have been liable for the costs for which security had been given, and it seems more natural to read these words as imposing on the Director of Public Prosecutions the liability from which the original prosecutor had by the preceding words been released, rather than to construe them as imposing a liability on the Director of Public Prosecutions greater than that from which the original prosecutor had just been released, and so to give the original prosecutor an immunity which there is nothing in the preceding words to show that he was intended to have. If it had been intended by the last clause that the Director of Public Prosecutions should bear the costs which might be ordered to be paid under 30 & 31 Vict. c. 35, in such a case as this I should certainly have expected to find in the preceding words some indication of an intention that the original prosecutor should be relieved from them. If, then, this is the natural interpretation of the language of the section, is it also the reasonable one? It is said it is unreasonable that the original prosecutor should remain liable for the costs when he has lost all control over the conduct of the prosecution. There would be more force in the observation if the liability to the costs followed automatically on the acquittal of the accused. But this is not so; the court is to make the order in its discretion; and, considering that the object of the section giving the court power to order the prosecutor to pay the costs was to discourage vexatious indictments too frequently preferred for purposes of extortion, it seems far more consistent with reason that in such a case as the present the liability should remain upon those who originally started the prosecution and preferred the indictment, rather than that it should be transferred to the Director of Public Prosecutions, whose action in undertaking a prosecution already commenced, and taking up a bill already found, the Legislature cannot reason-

ably have intended to discourage. If the defendant has been acquitted by reason that the prosecution was vexatious in its inception, there seems no adequate reason why the original prosecutor should be relieved from the burden of paying costs simply because, in the interests of justice, the Director of Public Prosecutions has thought it right to intervene. If the prosecution was not vexatious in its inception, but has failed by reason of the difficulty of proving the case, or even by reason of the intervention of the Director of Public Prosecutions, those seem reasons, not why the Director of Public Prosecutions should pay the costs, but why the defendant should not get his costs; and unless it was shown that the prosecution was vexatious, that is, begun and continued without reasonable and probable cause, or frivolous, I imagine that the court, in the due exercise of their discretion, would decline to give the defendant the costs of the trial. It is not necessary in this case to consider the wider question whether an order under 30 & 31 Vict. c. 35, can in any case be made on the Director of Public Prosecutions. It is enough to say that in this case, for the reasons given above, such an order could not be made, and therefore our judgment must be for the defendant. I should like to add for myself that of course we have not had before us the merits of the case, and are deciding simply on the point of law; but I find it very difficult to conceive what the circumstances could be which would justify such an order being made on the Director of Public Prosecutions.

SMITH, J.—In this case the Recorder of London, at the termination of a case before him at the Central Criminal Court, in the first instance made an order that the prosecutor or other person by or at whose instance the indictment was preferred should pay the costs to the defendants, and at a subsequent session he altered that order by making an order on the Director of Public Prosecutions to pay the said costs. Now, Gostling in this case instituted a criminal prosecution against Stubbs and Irving for conspiracy, but the charge was dismissed by the alderman who heard it. Thereupon Gostling was bound over under the provisions of the Vexatious Indictments Act (22 & 23 Vict. c. 17) to prosecute at the Old Bailey, and entered into recognisances in that behalf. Having been so bound over, he preferred an indictment at the Central Criminal Court against Stubbs and Irving, and having so preferred that indictment, he then brought himself within 30 & 31 Vict. c. 35, s. 2, which enacts that at the termination of a criminal prosecution the judge who tries it may, if he thinks right, order that the prosecutor pay the costs of the defendant if the defendant is acquitted. In these circumstances the Director of Public Prosecutions intervened, and conducted the case at the trial, and at the trial failed. Thereupon the order was made first of all that the prosecutor or other person should pay the defendants' costs, and subsequently the Recorder altered that order by making it an order upon the Director of Public

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*Practice—
Costs—Private prosecution—Case undertaken by Public Prosecutor—Acquittal of defendants—Liability of Public Prosecutor—22 & 33 Vict. c. 17; 80 & 31 Vict. c. 35, s. 2; 42 & 43 Vict. c. 22, s. 7.*

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v.
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1890.

*Practice—
Costs—Pri-
vate prosecu-
tion—Case un-
dertaken by
Public Prose-
cutor—Ac-
quittal of de-
fendants—
Liability of
Public Prose-
cutor—22 & 28
Vict. c. 17; 30
& 31 Vict. c.
35, s. 2; 42 &
43 Vict. c. 22,
s. 7.*

Prosecutions. The question which has been argued before us is, whether or not the Director of Public Prosecutions can be ordered under these circumstances to pay the costs of the defendants. Now, it is clear that he could not be ordered to pay by reason of 30 & 31 Vict. c. 35, s. 2, for the simple reason that he was not the person who in this case had preferred the indictment. But it was alleged that he could be made to pay by reason of 42 & 43 Vict. c. 22, s. 7, the last words of which enact that in certain cases the Director of Public Prosecutions shall be liable to costs in lieu of such person; that is, in lieu of the original prosecutor. That is a captivating argument until one looks carefully into the section to see what it provides. It is a section under which in certain events the Director of Public Prosecutions may be put under certain responsibilities; but it seems to me that he is only to be put under that responsibility from which the original prosecutor has been relieved. The section provides as follows: "Nothing in this Act shall interfere with the right of any person to institute, undertake, or carry on any criminal proceeding." Where any criminal proceeding is instituted, undertaken, or carried on by the Director of Public Prosecutions, such director shall not be bound over to prosecute or conduct such proceedings, or required to give security for costs." The meaning of that is obvious, because the Director of Public Prosecutions is an officer of state, and it would not be necessary to bind him over or to make him give security for costs. "And it shall not be necessary to bind over any person to prosecute or conduct such proceedings;" that is, when the Director of Public Prosecutions intervenes. Then the section proceeds: "And if any person is so bound over" (as the original prosecutor, Gostling, was in this case), "or has given security for costs" (Gostling had not done so, because it was not a case in which he could be called upon to do so), "he shall, upon the Director of Public Prosecutions undertaking the case, be released from such obligation" (that is, the obligation which he entered into by reason of his recognisance to prosecute), "and the security (for costs) shall be deemed to have been cancelled." So far there is no liability as to the payment of costs placed upon the Director of Public Prosecutions, but the private prosecutor is released from two things, namely, from his obligation to prosecute and from his obligation as to security for costs if he has given any. The section then proceeds with these words: "and the Director of Public Prosecutions shall be liable to costs in lieu of such persons." Liable to what costs? In my opinion, what the original prosecutor is released from the Director of Public Prosecutions comes under obligation to. And what the original prosecutor here has been released from is his obligation to prosecute, which was undertaken by the Director of Public Prosecutions, and his obligation as to security for costs, if any had been given, and for those costs only does the Director of Public Prosecutions become liable. It seems to me that on this reading

of the section the case is clear, and that this order, even if it could have been made in the court in which it was made, is not an order which should have been made. For these reasons I think that judgment must be for the defendant.

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Judgment for the defendant.
Solicitors for the plaintiffs, *C. O. Humphreys and Son.*
Solicitor for the defendant, *The Solicitor to the Treasury.*

Practice—
Costs—Private prosecution—Cases undertaken by Public Prosecutor—Acquittal of defendants—Liability of Public Prosecutor—22 & 23 Vict. c. 17; 80 & 81 Vict. c. 85, s. 2; 42 & 43 Vict. c. 22, s. 7.

CROWN CASES RESERVED.

Feb. 1 and 8, 1890.

(Before LORD COLERIDGE, C.J., POLLOCK, B., HAWKINS,
GRANTHAM, and CHARLES, JJ.)

REG. v. MILES. (a)

Indictment for unlawful wounding—Special plea of autrefois convict—Conviction for assault before court of summary jurisdiction—Defendant discharged on recognisances for good behaviour—24 & 25 Vict. c. 100, ss. 42 and 45; 42 & 43 Vict. c. 49, s. 16.

A person who has been convicted before a court of summary jurisdiction of an assault which in the opinion of such court was of so trifling a nature as to render it inexpedient to inflict any punishment, or other than a nominal punishment, and who has been discharged upon giving security to be of good behaviour, cannot afterwards be convicted upon an indictment, the charges in which are based upon the same assault.

Semble, per Hawkins, J., that the giving of security to be of good behaviour was intended by sect. 16 of the Summary Jurisdiction Act, 1879, as a substitution for punishment, and that by giving such security a defendant is placed in precisely the same position as if punishment had been inflicted upon and suffered by him.

Hartley v. Hindmarsh (14 L. T. Rep. N. S. 795; L. Rep. 1 O. P. 553; 35 L. J. 255, M. O.) distinguished.

THIS was a case reserved for the opinion of this court by Sir Thomas Chambers, Q.C., Recorder of London, which stated as follows:—

At the session of the Central Criminal Court held on the 16th day of December, 1889, George James Miles was arraigned before

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

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*Practice—
Plea of autre-
fois convict—
Indictment for
unlawful
wounding—
Previous con-
viction sum-
marily for
assault—De-
fendant dis-
charged on re-
cognisances for
good behavior
—24 & 25 Vict.
c. 100, ss. 42 &
45; 42 & 43
Vict. c. 49, s. 16.*

me on an indictment which charged him in the first count with unlawfully and maliciously wounding Charles Living; second count unlawfully inflicting grievous bodily harm on the said Charles Living; third count assaulting the said Charles Living, and thereby occasioning him actual bodily harm; fourth count a common assault on the said Charles Living; fifth count a common assault on Harry Anstey.

The indictment was as follows:

Central Criminal Court, to wit.—The jurors for our Lady the Queen upon their oath present that George James Miles, on the twenty-sixth day of October, in the year of our Lord eighteen hundred and eighty-nine, at the parish of West Ham, and within the jurisdiction of the Central Criminal Court, one Charles Living unlawfully and maliciously did wound, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Second count:

And the jurors aforesaid upon their oath aforesaid do further present that the said George James Miles, on the said twenty-sixth day of October in the year aforesaid, at the parish aforesaid, and within the jurisdiction of the said court, unlawfully and maliciously in and upon the said Charles Living did inflict grievous bodily harm, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Third count:

And the jurors aforesaid upon their oath aforesaid do further present that the said George James Miles, on the said twenty-sixth day of October in the year aforesaid, at the parish aforesaid, and within the jurisdiction of the said court, in and upon the said Charles Living unlawfully did make an assault, and him the said Charles Living did then unlawfully beat, wound, and ill-treat, thereby then occasioning to the said Charles Living actual bodily harm and other wrongs to the said Charles Living then did to the great damage of the said Charles Living, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Fourth count:

And the jurors aforesaid upon their oath aforesaid do further present that the said George James Miles, on the day and in the year aforesaid, at the said parish, and within the jurisdiction of the said court, in and upon the said Charles Living unlawfully did make an assault, and him the said Charles Living unlawfully did beat, wound, and ill-treat, and to the said Charles Living other grievous wrongs then and there unlawfully did, to the great damage of the said Charles Living, to the evil example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

Fifth count:

And the jurors aforesaid upon their oath aforesaid do further present that the said George James Miles, on the said twenty-sixth day of October in the said year, and at the said parish and in the said jurisdiction of the said court, in and upon Harry Anstey unlawfully did make an assault, and him the said Harry Anstey unlawfully did beat, wound, and ill-treat and other grievous wrongs to the said Harry Anstey, then and there unlawfully did to the great damage of the said Harry Anstey, to the evil example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

The prisoner handed in a special plea in bar of his prosecution so far as the first four counts of the indictment were concerned, and pleaded not guilty as to those counts and the fifth count, and a special reply was put in by the prosecution.

The following is a copy of the special plea :—

And the said George James Miles in his own proper person cometh into court here, and, having heard the said indictment read, saith that our said Lady the Queen ought not further to prosecute the said indictment against him the said George James Miles in respect of the offences in the first four counts of the said indictment mentioned, because he saith that heretofore, to wit on the twenty-eighth day of October in the year of our Lord one thousand eight hundred and eighty-nine, in the borough of West Ham, in the county of Essex, he, the said George James Miles, was, upon the complaint of the said Charles Living, duly convicted before the Court of Summary Jurisdiction sitting in and for the borough aforesaid, for that he, the said George James Miles, on the twenty-sixth day of October one thousand eight hundred and eighty-nine, did unlawfully assault and beat the said Charles Living, and the said court being of opinion that the said offence was of so trifling a nature that it was inexpedient to inflict any other than a nominal punishment, the said George James Miles, having given security to the satisfaction of the said court to be of good behaviour, was discharged as by the record of the said conviction more fully and at large appears, which said judgment and conviction still remains in force and effect, and not in the least reversed or made void. And the said George James Miles further saith that the assault and battery of the said Charles Living, of which he the said George James Miles was so convicted, as aforesaid and the wounding assault and battery in the first four counts of the said indictment mentioned, are one and the same assault and battery and not other and different. And this he, the said George James Miles, is ready to verify. Wherefore he prays judgment if our said Lady the Queen ought further to prosecute the said indictment against him, the said George James Miles, in respect of the said offences in the first four counts of the said indictment mentioned. And that the said George James Miles may be dismissed and discharged from the same. And as to the offences in the said indictment mentioned the said George James Miles saith that he is not guilty thereof, and therefore he puts himself upon the country.

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v.
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1890.

*Practice—
Plea of autre-
fois convict—
Indictment for
unlawful
wounding—
Previous con-
viction sum-
marily for as-
sault—Defen-
dant dis-
charged on re-
cognisances for
good behaviour
—24 & 25 Vict.
c. 100, ss. 42 &
45; 42 & 43
Vict. c. 49, s. 16.*

The reply was as follows :—

And hereupon Edward James Read, the clerk of the peace for the jurisdiction of the Central Criminal Court, who prosecutes for our said Lady the Queen in this behalf, says, that by reason of anything in the said plea of the said George James Miles above pleaded in bar alleged our said Lady the Queen ought not further to be precluded from prosecuting the said indictment against the said George James Miles, because he says that the said George James Miles was not on the twenty-eighth day of October one thousand eight hundred and eighty-nine before the Court of Summary Jurisdiction in and for the borough of West Ham upon the complaint of the said Charles Living or otherwise, or at all legally convicted of having on the twenty-sixth day of October unlawfully assaulted and beaten the said Charles Living that the said record of the said Court of Summary Jurisdiction recited in full in the said plea of the said George James Miles discloses no such conviction, order, or other determination of the said Court of Summary Jurisdiction as can in law operate as a bar to further prosecution by our said Lady the Queen under the said indictment that the said record of the said Court of Summary Jurisdiction recited in full in the said plea of the said George James Miles disclosed that the said Court of Summary Jurisdiction had proceeded under the provisions of section 16, sub-section 2, of the Summary Jurisdiction Act, 1879, that neither the said plea so pleaded by the said George James Miles as aforesaid, nor the said record of the said Court of Summary Jurisdiction hereinbefore mentioned, shows that any proceeding had been taken in respect of the said proceeding before the said Court of Summary Jurisdiction on the said twenty-eighth day of October under the provisions of the Offences against the Person Act, 1861, and the provisions of the forty-fifth section thereof, that the said George James Miles has not obtained any certificate, such as is mentioned in the said last mentioned section; that the said Court of Summary Jurisdiction inflicted no fine upon the said George James Miles, nor was the said George James Miles adjudged to be imprisoned so as to render any order so made by the said Court of Summary Jurisdiction on the said twenty-eighth day of October against the said George James Miles effectual as a bar to the further prosecution of the said indictment under or by virtue of the provisions of the said forty-fifth section of the said statute, and this the said Edward James Read is ready to verify. Wherefore he prays judgment and that the said George James Miles may be convicted of the premises in the said indictment above specified."

The evidence offered by the defendant in support of his plea

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*Practice—
Plea of autre-
fois convict—
Indictment for
unlawful
wounding—
Previous con-
viction sum-
marily for
assault—De-
fendant dis-
charged on re-
cognisances for
good behaviour
—24 & 25 Vict.
c. 100, ss. 42 &
45; 42 & 43
Vict. c. 49, s. 16.*

me on an indictment which charged him in the first count with unlawfully and maliciously wounding Charles Living; second count unlawfully inflicting grievous bodily harm on the said Charles Living; third count assaulting the said Charles Living, and thereby occasioning him actual bodily harm; fourth count a common assault on the said Charles Living; fifth count a common assault on Harry Anstey.

The indictment was as follows :

Central Criminal Court, to wit.—The jurors for our Lady the Queen upon their oath present that George James Miles, on the twenty-sixth day of October, in the year of our Lord eighteen hundred and eighty-nine, at the parish of West Ham, and within the jurisdiction of the Central Criminal Court, one Charles Living unlawfully and maliciously did wound, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Second count :

And the jurors aforesaid upon their oath aforesaid do further present that the said George James Miles, on the said twenty-sixth day of October in the year aforesaid, at the parish aforesaid, and within the jurisdiction of the said court, unlawfully and maliciously in and upon the said Charles Living did inflict grievous bodily harm, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Third count :

And the jurors aforesaid upon their oath aforesaid do further present that the said George James Miles, on the said twenty-sixth day of October in the year aforesaid, at the parish aforesaid, and within the jurisdiction of the said court, in and upon the said Charles Living unlawfully did make an assault, and him the said Charles Living did then unlawfully beat, wound, and ill-treat, thereby then occasioning to the said Charles Living actual bodily harm and other wrongs to the said Charles Living then did to the great damage of the said Charles Living, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Fourth count :

And the jurors aforesaid upon their oath aforesaid do further present that the said George James Miles, on the day and in the year aforesaid, at the said parish, and within the jurisdiction of the said court, in and upon the said Charles Living unlawfully did make an assault, and him the said Charles Living unlawfully did beat, wound, and ill-treat, and to the said Charles Living other grievous wrongs then and there unlawfully did, to the great damage of the said Charles Living, to the evil example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

Fifth count :

And the jurors aforesaid upon their oath aforesaid do further present that the said George James Miles, on the said twenty-sixth day of October in the said year, and at the said parish and in the said jurisdiction of the said court, in and upon Harry Anstey unlawfully did make an assault, and him the said Harry Anstey unlawfully did beat, wound, and ill-treat and other grievous wrongs to the said Harry Anstey, then and there unlawfully did to the great damage of the said Harry Anstey, to the evil example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

The prisoner handed in a special plea in bar of his prosecution so far as the first four counts of the indictment were concerned, and pleaded not guilty as to those counts and the fifth count, and a special reply was put in by the prosecution.

The following is a copy of the special plea:—

And the said George James Miles in his own proper person cometh into court here, and, having heard the said indictment read, saith that our said Lady the Queen ought not further to prosecute the said indictment against him the said George James Miles in respect of the offences in the first four counts of the said indictment mentioned, because he saith that heretofore, to wit on the twenty-eighth day of October in the year of our Lord one thousand eight hundred and eighty-nine, in the borough of West Ham, in the county of Essex, he, the said George James Miles, was, upon the complaint of the said Charles Living, duly convicted before the Court of Summary Jurisdiction sitting in and for the borough aforesaid, for that he, the said George James Miles, on the twenty-sixth day of October one thousand eight hundred and eighty-nine, did unlawfully assault and beat the said Charles Living, and the said court being of opinion that the said offence was of so trifling a nature that it was inexpedient to inflict any other than a nominal punishment, the said George James Miles, having given security to the satisfaction of the said court to be of good behaviour, was discharged as by the record of the said conviction more fully and at large appears, which said judgment and conviction still remains in force and effect, and not in the least reversed or made void. And the said George James Miles further saith that the assault and battery of the said Charles Living, of which he the said George James Miles was so convicted, as aforesaid and the wounding assault and battery in the first four counts of the said indictment mentioned, are one and the same assault and battery and not other and different. And this he, the said George James Miles, is ready to verify. Wherefore he prays judgment if our said Lady the Queen ought further to prosecute the said indictment against him, the said George James Miles, in respect of the said offences in the first four counts of the said indictment mentioned. And that the said George James Miles may be dismissed and discharged from the same. And as to the offences in the said indictment mentioned the said George James Miles saith that he is not guilty thereof, And therefore he puts himself upon the country.

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*Practice—
Plea of autre-
fois convict—
Indictment for
unlawful
wounding—
Previous con-
viction sum-
marily for as-
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The reply was as follows:—

And hereupon Edward James Read, the clerk of the peace for the jurisdiction of the Central Criminal Court, who prosecutes for our said Lady the Queen in this behalf, says, that by reason of anything in the said plea of the said George James Miles above pleaded in bar alleged our said Lady the Queen ought not further to be precluded from prosecuting the said indictment against the said George James Miles, because he says that the said George James Miles was not on the twenty-eighth day of October one thousand eight hundred and eighty-nine before the Court of Summary Jurisdiction in and for the borough of West Ham upon the complaint of the said Charles Living or otherwise, or at all legally convicted of having on the twenty-sixth day of October unlawfully assaulted and beaten the said Charles Living that the said record of the said Court of Summary Jurisdiction recited in full in the said plea of the said George James Miles discloses no such conviction, order, or other determination of the said Court of Summary Jurisdiction as can in law operate as a bar to further prosecution by our said Lady the Queen under the said indictment that the said record of the said Court of Summary Jurisdiction recited in full in the said plea of the said George James Miles disclosed that the said Court of Summary Jurisdiction had proceeded under the provisions of section 16, sub-section 2, of the Summary Jurisdiction Act, 1879, that neither the said plea so pleaded by the said George James Miles as aforesaid, nor the said record of the said Court of Summary Jurisdiction hereinbefore mentioned, shows that any proceeding had been taken in respect of the said proceeding before the said Court of Summary Jurisdiction on the said twenty-eighth day of October under the provisions of the Offences against the Person Act, 1861, and the provisions of the forty-fifth section thereof, that the said George James Miles has not obtained any certificate, such as is mentioned in the said last mentioned section; that the said Court of Summary Jurisdiction inflicted no fine upon the said George James Miles, nor was the said George James Miles adjudged to be imprisoned so as to render any order so made by the said Court of Summary Jurisdiction on the said twenty-eighth day of October against the said George James Miles effectual as a bar to the further prosecution of the said indictment under or by virtue of the provisions of the said forty-fifth section of the said statute, and this the said Edward James Read is ready to verify. Wherefore he prays judgment and that the said George James Miles may be convicted of the premises in the said indictment above specified."

The evidence offered by the defendant in support of his plea

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consisted of an examined copy of a record of the court of summary jurisdiction sitting at West Ham (a), and of evidence that the offences charged in the first four counts of the indictment related to the same matter as the offences mentioned in the said record. The counsel for the prosecution did not dispute that the first four counts of the indictment referred to the same matter as the offence mentioned in the said record, but argued that the said record did not disclose any conviction within the meaning of 24 & 25 Vict. c. 100, s. 45, on the ground that the court had neither ordered the defendant to pay a fine nor to be imprisoned; and in support of that contention he referred to the case of *Hartley v. Hindmarsh* (*ubi sup.*). The counsel for the defence argued that by the 42 & 43 Vict. c. 49, s. 16, sub-sect. 2, express power was given to the magistrate, upon convicting a person of assault, to discharge him conditionally on his giving security to be of good behaviour, and that the 24 & 25 Vict. c. 100, s. 45, must now be read with the section of 42 & 43 Vict. c. 49, above referred to, and that consequently the case quoted by the counsel for the prosecution was no longer in point.

I determined to hear the facts of the case upon the plea of not guilty, and, if necessary, to reserve the point raised on the pleadings for the consideration of the court. The defendant was ultimately convicted on the first four counts of the indictment, and acquitted on the fifth count, and I reserved the question of the sufficiency of the plea in bar for the opinion of this court, and admitted the prisoner to bail pending its decision.

The question for the opinion of the court is: Whether the proceedings before the court of summary jurisdiction against the defendant in respect of the assault upon Charles Living were a bar to the proceedings against him at the Central Criminal Court by indictment for the same offence.

In the event of the court being of opinion that such proceed-

(a) A copy of the record accompanied the case, and was as follows:—

“West Ham Police Court. In the Borough of West Ham.

Before the Court of Summary Jurisdiction, sitting at the Police Court, West Ham-lane, Stratford, within the said borough, the 28th day of October, 1889.

George James Miles (hereinafter called the defendant) is this day convicted for that he on the 26th day of October, 1889, within the borough of West Ham aforesaid, did unlawfully assault and beat one Charles Living.

But the Court being of opinion that the said offence was of so trifling a nature that it is inexpedient to inflict any other than a nominal punishment, and the defendant having given security to the satisfaction of this court to be of good behaviour, is discharged.

ERNEST BAGGALLAY.

L. S.

Police Magistrate, Justice of the Peace for the Borough of West Ham aforesaid.

I certify the above to be a true copy,

W. H. FOWLER.

Clerk of the Court of Summary Jurisdiction aforesaid.”

ings were a bar to the proceedings at the Central Criminal Court the conviction is to be quashed, and judgment entered for the defendant on his special plea; otherwise it is to be affirmed.

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24 & 24 Vict. c. 100, s. 44, enacts that :

If the justices, upon the hearing of any such case of assault or battery upon the merits, where the complaint was preferred by or on behalf of the party aggrieved, under either of the last two preceding sections, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred.

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Sect. 45 enacts that :

If any person against whom any such complaint as in either of the last three preceding sections mentioned shall have been preferred by or on behalf of the party aggrieved, shall have obtained such certificate, or, having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment or imprisonment with hard labour awarded, in every such case, he shall be released from all further or other proceedings, civil or criminal, for the same cause.

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The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 16, enacts that :

If upon the hearing of a charge for an offence punishable on summary conviction under this Act, or under any other Act, whether past or future, the court of summary jurisdiction think that, though the charge is proved, the offence was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment or any other than a nominal punishment . . . (3) the court, upon convicting the person charged, may discharge him conditionally upon his giving security, with or without sureties, to appear for sentence when called upon, or to be of good behaviour, and either without payment of damages and costs or subject to the payment of such damages and costs, or either of them, as the court think reasonable.

Poland, Q.C. (with him *Warburton*), for the defendant, contended that, both at common law and by statute, the previous conviction before the court of summary jurisdiction was a bar to the present proceedings, which, although they charged the offence in a different manner, were in respect of the same offence: (*Reg. v. Elrington*, 5 L. T. Rep. N. S. 585; 1 B. & S. 688; 31 L. J. 14, M. C.; *Reg. v. Walker*, 2 M. & R. 446; *Holden and Wife v. King*, 46 L. J. 75, Ex.) The argument of the prosecution amounted to this, that, because the magistrate did not impose a day's imprisonment or inflict a fine of a few pence the case did not come within 24 & 25 Vict. c. 100, s. 45. That section, however, merely means that the defendant "shall have paid" if ordered to pay, or "shall have suffered imprisonment" if imprisonment was actually imposed. The question was set at rest by the subsequent enactment in 42 & 43 Vict. c. 49, s. 16, and the conviction in the court of summary jurisdiction was drawn up in the form prescribed by rule 47 of the rules under that Act. The conviction remains as it was previously, and the Act of 1879 merely imposes a new form of punishment. The case of *Hartley v. Hindmarsh* (*ubi sup.*) is distinguishable on two grounds. First, the conviction there, if there was one, was not proved by an examined copy of the record, and in the second

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place it does not appear from the reports of the case that there was ever any conviction at all. In *Wemyss v. Hopkins* (L. Rep. 10 Q. B. 378) it was held that the fact that a person had been convicted by justices under one Act of Parliament for what amounted to an assault was a bar to a conviction under another Act for the same assault; the rule at common law being, that where a person has been convicted and punished for an offence by a court of competent jurisdiction, the conviction is a bar to all further proceedings for the same offence. Under sect. 44 of 24 & 25 Vict. c. 100, there was power before the Summary Jurisdiction Act to give a certificate of dismissal. Here, however, the magistrate thought it right to convict, but imposed a nominal punishment. If, then, a certificate of acquittal was a bar to subsequent proceedings, *à fortiori* must a conviction be a bar. In order to support their contention the prosecution must rely upon the strict words of the statute, and not upon good sense or law.

Lockwood, Q.C. (with him *Besley*), for the prosecution, contended that what had taken place before the magistrate was no bar to the subsequent proceedings, for there had been no punishment imposed or penalty inflicted. The magistrate did not act under 24 & 25 Vict. c. 100, at all, but under the Summary Jurisdiction Act, 1879. Under the former statute he had no power to impose a nominal punishment, and yet the defence had to rely upon the provisions of that statute, because there was no bar independently of the express statutory provision, otherwise the provision would have been unnecessary. [HAWKINS, J.—What is there in the old law to prevent the magistrate from requiring the defendant to receive sentence? There has been no judgment on the conviction before him.] It is to be presumed that the security would be to be of good behaviour, and in default to come up for judgment; and if the defendant is at large without any judgment having been passed upon him, he cannot avail himself of the bar, for he cannot say he has been punished, and he cannot say that the matter was too trivial for punishment, for he has not the necessary certificate. The protection which was held to exist in *Reg. v. Eltrington* is a statutable one, and there is no protection at common law where the offence in respect of which subsequent proceedings are taken is a different offence. [Lord COLERIDGE, C.J.: If a person is acquitted on a graver charge which includes a lesser charge, that supports a plea of *autrefois acquit* in respect of the lesser offence: (*Reg. v. Bird*, 5 Cox C. C. 11; 2 Den. C. C. 94; 20 L. J. 70, M. C.; 15 Jur. 193; T. & M. 437.)—POLLOCK, B.: I should like you to deal with the common law principle. In *Reg. v. Walker* (2 M. & Bob. 446) Coltman, J. says: "I see no difference between a conviction and an acquittal;" and that is cited with approval by Cockburn, C.J. in *Reg. Eltrington* (*ubi sup.*).] The case of *Hartley v. Hindmarsh* shows what kind of conviction was contemplated by the courts in those days as a bar.

Poland, Q.C. in reply.—It is a fundamental principle of law that a man shall not be twice tried for the same cause; and the statute merely re-enacted what was the common law, and applied the principle applicable to criminal cases for the purposes of the civil law. Here the defendant was either convicted or acquitted. If he forfeited his recognisances he might still be brought before the magistrate and punished; and he clearly ought not to be in worse position than he would have been in if he had asked for punishment rather than be allowed to go free.

Feb. 8.—The following judgments were read :—

HAWKINS, J.—The indictment in this case contains five counts. It is, however, only necessary to notice the first, second, third, and fourth, for upon the fifth the defendant was acquitted generally upon a plea of not guilty. The first count charged an indictable offence under sect. 20 of 24 & 25 Vict. c. 100, namely, that on the 26th day of October, 1889, at the parish of West Ham, the defendant unlawfully and maliciously did wound one Charles Living. The second count charged an indictable offence under the same section, namely, that on the same day, and at the same place, the defendant unlawfully and maliciously did inflict grievous bodily harm in and upon the said Charles Living. The third count charged an indictable offence under sect. 47 of the same Act, namely, that on the same day, and at the same place, the defendant unlawfully did assault the said Charles Living, and beat, wound, and ill-treat him, thereby occasioning to him actual bodily harm. The fourth count charged an indictable offence under the same section, namely, that on the same day at the same place the defendant unlawfully did assault the said Charles Living, and beat, and wound, and ill-treat him. To these four counts the defendant pleaded not guilty, and also a plea in bar founded upon the forty-fifth section of the same Act of Parliament, a copy of which plea forms part of the case. The material allegations contained in that plea are, that on the 28th day of October, 1889, the defendant was, upon the complaint of the said Charles Living, duly convicted before the court of summary jurisdiction sitting in and for the borough of West Ham, "for that he, the defendant, on the 26th day of October, 1889, did unlawfully assault and beat the said Charles Living, and that the said court, being of opinion that the said offence was of so trifling a nature that it was inexpedient to inflict any other than a nominal punishment, the defendant, having given security to the satisfaction of the said court to be of good behaviour, was discharged." The plea then alleges that the "assault and battery" of which the defendant was so convicted, and the wounding, assault, and battery in the first four counts of the indictment mentioned, are one and the same assault and battery, and not other and different. No question arises on the form of the reply, which substantially puts in issue the validity of the plea. On the trial before the Recorder of London, the defendant was found guilty upon each of the said counts, subject to

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the validity and proof of his 'special plea, in support whereof the record of the convictions before the court of summary jurisdiction was put in, and it must be taken as found by the jury upon due proof that the first four counts referred to the same matter as the offence mentioned in the record of the summary conviction. The enactments under which the plea in question is pleaded are sects. 44 and 45 of the statute relating to offences against the person (24 & 25 Vict. c. 100). Sect. 42 enacts that where any person shall unlawfully assault or beat any other person, two justices of the peace may, upon complaint by or on behalf of the party aggrieved, hear and determine such offence, and upon conviction such justices may either fine the offender a sum not exceeding 5*l.*, or commit him to prison for a term not exceeding two months. The assaults mentioned in this section are in sect. 43 referred to as "common assaults and batteries." Then comes sect. 44, which enacts: "If the justices upon the hearing of any such case of assault or battery upon the merits shall deem the offence not to be proved, or shall find the assault and battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint they shall forthwith make out a certificate under their hands stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred." By sect. 45 it is enacted: "If any person against whom such complaint shall have been preferred by or on the behalf of the party aggrieved, shall have obtained such certificate, or, having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment, or imprisonment with hard labour, awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause." The record of the proceedings before the justices is in these terms: "West Ham, Police Court in the borough of West Ham, before the court of summary jurisdiction, sitting at the police-court, West Ham-lane, &c., the 28th day of October, 1889. George James Miles (hereinafter called the defendant) is this day convicted, for that he on the 26th day of October, 1889, within the borough of West Ham, did unlawfully assault and beat one Charles Living. But the court being of opinion that the offence was of so trifling a nature that it is inexpedient to inflict any other than a nominal punishment, and the defendant having given security to the satisfaction of this court to be of good behaviour, is discharged." This conviction was under the hand and seal of the police magistrate for the borough of West Ham. It is obvious that, if the defence rested solely upon the provisions of the 24 & 25 Vict. c. 100, above set forth, grave objections might be made to its validity, for the case was not dismissed, and, even had it been so, no certificate of dismissal was given to the defendant. Moreover, although the record alleges that the defendant was convicted, and intimates the inexpediency of inflicting more

than a nominal punishment, that nominal punishment is not fixed or determined, either as to its character or amount, and it will be noted that fine and imprisonment are the only punishments contemplated by the 42nd section. Therefore no averment could be truly made that the defendant has paid the fine or suffered the imprisonment awarded. The case of *Hartley v. Hindmarsh* (*ubi sup.*) would, as it seems to me, be in point against the plea, had the provisions of the 24 & 25 Vict. stood alone. By the Summary Jurisdiction Act, 1879, however (42 & 43 Vict. c. 49), which was passed long after the decision of *Hartley v. Hindmarsh*, important discretionary power was vested in justices as to the infliction of punishment, and as to discharge without punishment, upon conviction for offences punishable upon summary conviction. By sect. 16 of that statute it is enacted that, "If upon the hearing of a charge for an offence punishable upon summary conviction, the court of summary jurisdiction think that, though the charge is proved, the offence was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment or any other than a nominal punishment"—sub-sect. 1: "The court, without proceeding to conviction, may discharge the information, and, if the court think fit, may order the person charged to pay such damages, not exceeding forty shillings, and such costs of the proceedings or either of them as the court think reasonable;" or sub-sect. 2: "The court upon convicting the person charged, may discharge him conditionally on his giving security with or without sureties, to appear for sentence when called upon, or to be of good behaviour, and either without payment of damages and costs, or subject to the payment of such damages and costs, or either of them, as the court may think reasonable." In cases of assault, where the complaint is dismissed, it seems to me that a certificate of dismissal is still necessary to entitle a defendant to the benefit of the provisions contained in sect. 45 of 24 & 25 Vict. But in cases where the justices, though they have convicted, think the offence deserving only of a nominal punishment, or of no punishment at all, and, acting under the power contained in the second sub-section, determine to discharge the defendant without any punishment on his giving merely security to be of good behaviour, and such security is given, I am, without expressing any settled opinion on the point, strongly inclined to think that nothing more is necessary to entitle him to the privileges conferred by the 24 & 25 Vict. c. 100, s. 45. For I think the giving of security for good behaviour under such circumstances is intended as a substitute for punishment, and that the effect of such substitution, coupled with the performance of the condition—*i.e.*, the giving the security for good behaviour—would place the defendant precisely in the same position as if punishment had actually been inflicted and suffered. It certainly could never have been intended by the Legislature that a person whose offence at the most deserved nothing beyond a nominal punishment, which had been foregone

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on his recognisances for good behaviour, should be in a worse position than a person whose offence had been visited by a substantial punishment which he had suffered. There may be, and I think are, objections to the form of the plea as framed, but thinking, as I do, that the common law defence I am about to refer to is such as entitles the defendant to have the conviction in question quashed, it is not necessary to discuss them upon the present occasion. I would, however, observe that, inasmuch as these common law defences to the indictment would afford no defence to civil proceedings, it would be expedient in future, if justices desire to give a defendant the protection afforded by the 44th and 45th sections of the 24 & 25 Vict., that they should found their proceedings and judgment upon the provisions of that Act, rather than upon the later Summary Jurisdiction Act, the provisions of which are not very clear, and when they were framed the previous enactments of 24 & 25 Vict. were evidently not clearly remembered by the draftsman. The justices will do well also to bear in mind that they may also award damages under the later statute if they think it right to do so. With regard to the common law defence relied on as an answer to this indictment, it is not strictly a plea of *autrefois convict* (except as to the fourth count, which charged a mere common assault), because the defendant had never previously been actually convicted of either of the offences in the form in which they are charged in the first three counts; but it was a defence grounded, as Blackburn, J. said in *Wemyss v. Hopkins* (*ubi sup.*), on the well-established rule at common law that where a person has been convicted and punished for an offence by a court of competent jurisdiction, *transit in rem judicatam*, that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter; otherwise there might be two different punishments for the same offence." This rule of law so stated has never been doubted or qualified in any one of the numerous authorities which are to be found in the books upon the subject, though it has not always been found easy to apply the rule to the facts of the particular cases under discussion. In the case cited (*Wemyss v. Hopkins*), where the appellant had been summarily convicted by justices under the Highway Act (5 & 6 Will. 4, c. 50), s. 78, for an offence which, though charged as a mere offence against the Highway Act, amounted also to an assault in law, it was held that he could not afterwards be convicted upon the same facts of an assault under sect. 42 of 24 & 25 Vict. c. 100. That was a case too clear to admit of a reasonable doubt, and is a good illustration of the general rule of law. The difficulties which have arisen in the application of the rule have most frequently occurred in cases where a conviction or acquittal for a simple offence has been set up as a bar to a subsequent charge against the same person in a more aggravated form, and the law, as deducible from the numerous cases to be found on the subject, seems to be this—that where a criminal

charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence, whether with or without circumstances of aggravation, and whether such circumstances of aggravation consist of the offence having been committed with malicious or wicked intent, or by reason that the committal of the offence was followed by serious consequences. In this respect the criminal law is in unison with that which prevails in civil proceedings. Whoever heard of a new action prevailing after a verdict and judgment for damages for the same cause of action simply on the ground that the damages were insufficient, or that the conduct of the defendant was, since the verdict and judgment, discovered to be more malicious than it was deemed to be at the trial? Judgment recovered in a former action was always a good plea at bar. In *Reg. v. John Walker (ubi sup.)* it was held by Coltman, J. that a conviction for an assault by wounding before justices was a bar to an indictment for the same assault and wounding with felonious intent to maim, disable, and do grievous bodily harm. In *Reg. v. Stanton* (5 Cox C. C. 324) the prisoner was indicted for wounding with intent to murder. He had previously been convicted and punished summarily for a common assault, founded upon the same facts. The jury found the prisoner guilty of a common assault. In answer to a question of Erle, J. why the previous conviction had not been pleaded, it was said there was a difficulty in pleading a conviction for an assault to a charge, whereupon the learned judge said that in his opinion the conviction would, if pleaded, have been an estoppel to the judgment for the felonious assault, and, though not pleaded, he treated the charge as having been adjudicated upon. Ten years later the same point was decided in *Reg. v. Elrington (ubi sup.)*, where to an indictment for assault and maliciously wounding, and causing grievous bodily harm, &c., a plea that on the hearing of a charge for the same assault treated as a common assault before justices they had dismissed the complaint, was held a bar. The true ground upon which these decisions were based seems to be that the summary conviction or dismissal of the charges in each case operated as an absolute bar to any further proceedings for or in respect of the same assault; and as the aggravating circumstances unless coupled with the assault amounted to no crime, there was nothing to support the indictment. No doubt it seems a little startling that a conviction for a common assault, accompanied by a shilling fine or a dismissal of the complaint as too trifling for any punishment, should afford an answer to a subsequent indictment for that same assault upon conclusive evidence that it was accompanied by an intent to murder; but reason and good sense point out that, even at the risk of occasional miscarriages of justice, when once a criminal charge has been adjudicated upon by a court having jurisdiction,

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that adjudication ought to be final, and after all such miscarriages are very rare. No system of judicature can be suggested in which occasionally failure to ensure complete justice may not arise. After a most solemn and careful trial of an indictment for murder resulting in the acquittal of the person charged, it may happen that within a week the most cogent and conclusive proof of his guilt may come to light, or he may actually confess his crime, yet his first acquittal is final. So with justices of the peace. After a summary conviction or dismissal of a charge upon which they have lawfully adjudicated, evidence may be discovered which would probably have induced them to come to an opposite conclusion. Yet, as in the case of an acquittal or conviction upon an indictment, their acquittal or conviction upon complaint within their jurisdiction is equally final, and their decision upon matters within their jurisdiction cannot, as I have already shown, be altered by presenting the same charge in the shape of an indictment before a jury in an aggravated form. But it is not every summary conviction or acquittal for a common assault which will operate as a bar to an indictment for an offence in which that assault was an element. It could hardly be contended that a previous conviction for a common assault could be pleaded in bar to an indictment for murder, though to prove the murder it might be essential to prove the assault adjudicated upon. For the offence of murder consists in felonious killing. So also of manslaughter: (see *Reg. v. Morris*, 16 L. T. Rep. N. S. 636; 10 Cox C. C. 480; L. Rep. 1 C. C. R. 90; 36 L. J. 84, M. C.) So, again, a conviction for a common assault could not be pleaded in bar to an indictment for rape. Though possibly it might be for an assault with intent to commit rape; for the essence of the crime of rape is a felonious assault by penetration of the person of the prosecutrix which justices have no jurisdiction to adjudicate upon. And although it is quite true that on a charge of common assault, evidence may be given of circumstances which, if true, would constitute a rape; and true also that the justices must form in their own minds an opinion as to the credibility of that evidence with a view to determining whether their jurisdiction to deal with the matter has been ousted or not; and true also that if they disbelieve that evidence they may nevertheless believe that an assault, though not one of the particular character constituting a rape, has been committed, and convict the person charged accordingly, as was done in *Wilkinson v. Dutton* (32 L. J. 152, M. C.); their conviction, nevertheless, would be no bar to an indictment for rape, for though incidentally they might be obliged to consider the evidence in order to determine whether they had jurisdiction over the charge before them, they would have no jurisdiction whatever to adjudicate upon the offence of rape, and their disbelief of the evidence would have no greater effect upon the charge of rape than if they had simply refused to commit for trial upon it, in which case no one would question that an indictment might be

presented by anybody who was dissatisfied with the justices' refusal. This subject was a good deal discussed in the Court of Exchequer in *Re Thompson* (6 H. & N. 193; 30 L. J. 19, M. C.). It might be suggested that it may so happen that justices take a grievously erroneous view of the facts presented to them, and that by convicting of a common assault when the facts point to a serious felony justice may be defeated, and a great criminal may escape the punishment due to his crime. True it is that it may so happen, so it may that a judge or jury may take an erroneous view of facts presented to them. For this there is no remedy. Such misfortunes are mere accidents and of very rare occurrence, and are very unlikely to happen by reason of any default of the justices if they will pursue, as I am sure they ever endeavour, the simple course of steadily bearing in mind the charge before them. If that charge be one of felony or misdemeanour, punishable by indictment only, they have no jurisdiction to adjudicate; they can but commit for trial, or refuse to do so. In matters before them in which they are called upon to adjudicate they must do so, unless they have upon the facts an alternative to send for trial upon indictment. In assault cases especial provision is made to this effect by sect. 46 of 24 & 25 Vict. c. 100, by which it is "Provided that, in case the justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is from any other circumstance a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as if they had no authority finally to hear and determine the same." In the case before us the doubts I once entertained are removed—the one and the same assault of which the defendant was convicted is the sole foundation upon which the conviction at the Central Criminal Court is rested, although aggravations are added to it which at first sight make the offences appear different, more particularly the count for wounding—but I find it alleged, and found as a fact that that wounding formed part of the assault and battery of which the defendant was convicted, as well it might, without amounting to unlawful malicious wounding, which is purely an indictable offence under sect. 20 of 24 & 25 Vict. c. 100. This is recognised law: (see *Reg. v. Taylor*, 20 L. T. Rep. N. S. 402; 11 Cox C. C. 261; L. Rep. 1 C. C. R. 194; 38 L. J. 106, M. C.; 17 W. R. 623.) For the reasons I have given I am now satisfied that the conviction before us ought to be quashed.

POLLOCK, B.—This conviction ought, in my opinion, to be quashed. If the question depended solely upon whether the previous conviction pleaded by the prisoner was a good bar to the present indictment, as coming within the provisions of the 24 & 25 Vict. c. 100, s. 45, I should pause before I came to such a conclusion, as the language of this section is certainly not in accord with that of sect. 16 of 42 & 43 Vict. c. 49. My decision

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is based upon broader grounds, that the conviction pleaded and the evidence given in support of it, formed a good bar at common law to the present indictment. That indictment, by the first four counts, charged the prisoner in different forms with wounding and inflicting bodily harm on Charles Living. The prisoner, by his plea, alleged that he on a certain day was, upon the complaint of the said Charles Living, duly convicted before a court of summary jurisdiction, for that he did unlawfully assault and beat the said Charles Living, and the court being of opinion that the offence was of so trifling a nature that it was inexpedient to inflict any other than a nominal punishment, the prisoner having given security to the satisfaction of the court to be of good behaviour, was discharged, as by the record appeared, which judgment and conviction still remained in force, and in support of this plea he produced the conviction, which was in the following form: "The 28th day of October, 1889, George James Miles (hereinafter called the defendant) is this day convicted for that he on the 26th day of October, 1889, did unlawfully assault and beat one Charles Living; but, the court being of opinion that the said offence was of so trifling a nature that it is inexpedient to inflict any other than a nominal punishment, and the defendant having given security to the satisfaction of this court to be of good behaviour, is discharged." This is a good conviction, and within the jurisdiction of the magistrate under 42 & 43 Vict. c. 49, s. 16 (the Summary Jurisdiction Act, 1879). At the trial it was proved on behalf of the prisoner, and admitted by counsel for the prosecution, that the first four counts of the indictment referred to the same matter as the offence mentioned in the record. In substance therefore the plea and the evidence establish that there was but one offence, and that the acts done by the defendant in respect of which he was convicted, by whatever legal name they might be called, were the same as those to which the indictment referred. And therefore the rule of law *Nemo debet bis puniri pro uno delicto* applies, and if the prisoner were guilty of the modified crime only he could not be guilty of the same acts, with the addition of malice and design. In *Reg. v. Walker (ubi sup.)* it was held that a plea of *autrefois convict* of an assault before magistrates is a bar to an indictment for feloniously stabbing in the same transaction. *Reg. v. Stanton (ubi sup.)* is to the same effect. These are decisions by single judges, but they were cited and approved of by the Court of Queen's Bench in *Reg. v. Elrington (ubi sup.)*, where Cockburn, C.J. says: "We must bear in mind the well-established principle of our criminal law that a series of charges shall not be preferred, and whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form." This is not only the law, but it is consonant with sound sense and the just treatment of defendants. One case only is cited by the prosecution, which might at first sight seem to be contrary to this view, viz., *Hartley v. Hindmarsh (ubi sup.)*; but, upon looking

at the decision in that case, it will be found that the conviction was not pleaded as a bar at common law, but under the statute 24 & 25 Vict. c. 100, s. 45, and the judgment of the court proceeded upon the grounds that there was no record of any conviction, and further that the magistrate did not adjudicate upon the case, but as a conservator of the peace ordered the defendant to enter into recognisances.

Lord COLERIDGE, C.J.—I am very glad that the delivery of the opinion of the court was adjourned for a week, because it has enabled my brother Hawkins to go very fully into the matter, and to deliver a very elaborate judgment. But, so far as saying that I agree with all he has said, I do not feel at liberty to go. I do not say for a moment that I differ from his judgment, but I have only this moment heard it for the first time, and it must therefore stand on the authority of my learned brother alone, which is quite sufficient to support it. I ought to say for myself that at the conclusion of the arguments I was prepared to give my judgment on the grounds put by my learned brothers Pollock and Charles. My learned brother Charles has written a judgment in which he has embodied the views I took of the case, and I desire it to be taken as expressing not only the views of my brothers Grantham and Charles, but also my own views on the matter.

CHARLES, J.—George James Miles was indicted at the December sessions of the Central Criminal Court before the Recorder of London for (1) unlawfully and maliciously wounding Charles Living; (2) unlawfully inflicting on him grievous bodily harm; (3) assaulting him and occasioning him actual bodily harm; (4) common assault. He pleaded to these four counts that [Reads the plea.] The record of the conviction was, so far as is material, as follows: [Reads it.] This plea was proved at the trial; indeed, it was not disputed that the offences charged in the first four counts related to the same matter as the offence mentioned in the record, but counsel for the prosecution argued that the record did not disclose any conviction within the meaning of 24 & 25 Vict. c. 100, s. 45, the court having neither ordered the defendant to pay a fine nor to be imprisoned. The counsel for the defendant argued that by 42 & 43 Vict. c. 49, s. 16, sub-sect. 2, express power was given to the magistrate upon convicting a person of assault to discharge him conditionally on his giving security to be of good behaviour, and that 24 & 25 Vict. c. 100, s. 45, must be read with the section above referred to. The defendant was convicted on the first four counts of the indictment, and the Recorder reserved the following question for the opinion of the court: "Whether the proceedings before the court of summary jurisdiction against the defendant in respect of the assault upon Charles Living were a bar to the proceedings against him at the Central Criminal Court for the same offence?" The answer to this question does not, in my opinion, depend in any way on the construction of the 45th section of 24 & 25 Vict. c. 100, and the 16th section of 42 & 43 Vict. c. 49.

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I think the proceedings were a bar apart from any statutory provision, and that the conviction should be quashed in accordance with the well-established rule at common law—that where a person had been convicted for an offence by a court of competent jurisdiction, the conviction is a bar to all further criminal proceedings for the same offence. This rule has been acted on again and again, and I see no reason why it should not be acted upon in this case. It cannot be material that a magistrate has power by statute to deal with a convicted person otherwise than by fine or imprisonment; for it is the conviction, and not the nature of the sentence, that constitutes the bar. The principle is that no man shall be placed in peril of legal penalties more than once on the same accusation. This being the view which I take of the case, it is unnecessary to decide whether the defendant is entitled to the protection provided by 24 & 25 Vict. c. 100, s. 45. I may add that upon the question reserved no point arises on the form of the special plea, which, however, I think may be regarded as an informal plea of *autrefois convict*.

LORD COLERIDGE, C.J.—It is therefore the unanimous opinion of the court that the conviction should be quashed.

Conviction quashed.

Solicitor for the prosecution, *Seeley and Son*.

Solicitor for the defendant, *O. O. Sharman*.

CROWN CASES RESERVED.

Saturday, February 1, 1890.

(Before Lord COLERIDGE, C.J., POLLOCK, B., HAWKINS,
GRANTHAM, and CHARLES, JJ.)

REG. v. JAMES. (a)

Larceny—Letters in course of transmission through post—Inducing postman to hand over letters addressed to other persons—Accessory before the fact of theft by postman—24 & 25 Vict. c. 94, s. 1.

A person who without authority induces a servant of the Postmaster-General to hand over to him and so receives letters addressed to persons other than himself, which come into the possession of such servant in the course of their transmission

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

through the post, is guilty of larceny of the letters so received, either at common law as a principal in the commission of the larceny by the servant, or, under 24 & 25 Vict. c. 94, s. 1, as an accessory before the fact of such larceny.

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CASE reserved by Stephen, J. at the Gloucestershire Assizes, and stated as follows:—

On the 27th day of November, 1889, Nathan James was convicted before me at Gloucester for stealing a post letter, the property of the Postmaster-General, from Edward Hopkins James, an officer of the Post-office, under the following circumstances:—

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by post—In-
ducing postman
to deliver letters
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Nathan James was a servant of Messrs. Burlingham and Co., and it was his duty to take orders and receive money on their behalf. He sent his books to their office at Evesham every half-year. The books ought to show what customers were indebted to Messrs. Burlingham, and for what amounts. The accounts due were made out to the debtors and sent to them by post. The prisoner made a list of the customers by whom such letters would be received. He gave it to several postmen and asked them to give him such letters as arrived for those persons in Messrs. Burlingham's envelopes. He collected the sums due from them, and kept back the letters from Messrs. Burlingham and Co. claiming payment. He was thus enabled to appropriate the money he collected, which he did in about thirty instances, the letters being found in his possession. Edward Hopkins James said the prisoner said to him, "Will you retain certain letters that are coming through the post from Messrs. Burlingham, as they are accounts that have been paid in to me, and I don't want people to have them after they have paid their account?" I said I thought it was wrong, and he afterwards said to me if anyone was to suffer he would, not me. In consequence, E. H. James gave the prisoner a good many of the letters in question instead of delivering them to the persons to whom they were addressed. I directed the jury that if they believed this evidence it proved that both Nathan James and E. H. James were guilty of theft. If this direction was right the conviction is to be affirmed; if wrong, it is to be quashed.

Gwynne James (as *amicus curiæ*) referred the court to *Reg. v. Batters* (6 C. & P. 147) and *Reg. v. Emmell* (9 C. & P. 365), upon which he had relied when defending the prisoner at the trial; and submitted that clearly no property in the letters had passed to the postman, and therefore he was the thief; and the only offence the prisoner could be guilty of was that of receiving. It was a question for the jury whether the prisoner was present when the postman actually took the letters. [HAWKINS, J.—The letters were not actually out of the possession of the servant of the Postmaster-General until they were in the hands of the receiver in this case.] If the taking of the letters was the joint act of the prisoner and the postman, no doubt the prisoner was guilty.

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Letter in course
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by post—In-
ducing postman
to deliver letters
addressed to
other persons—
21 & 25 Vict.
c. 94, s. 1.*

Staveley Hill, Q.C. and Cleaves, on behalf of the prosecution, were not called upon.

LORD COLERIDGE, C.J.—In this case I entertain no doubt whatever. The prisoner was either a joint thief with the postman, or he was an accessory to the taking of the letters before the fact, and by 24 & 25 Vict. c. 94, s. 1, liable to be convicted in all respects as if he had been a principal felon. In either case I am of opinion that he was rightly convicted.

POLLOCK, B.—I am of the same opinion.

HAWKINS, J.—The man was a thief no matter how you look at it. He was either a principal felon at common law, or by the statute 24 & 25 Vict. c. 94, s. 1, as an accessory before the fact, he was in the same position as if he had been the principal felon. In either case, therefore, he was guilty.

Conviction affirmed.

Solicitor for the prosecution, *The Solicitor to the Post Office.*

CROWN CASES RESERVED.

Saturday, May 10, 1890.

(Before LORD COLERIDGE, C.J., HAWKINS, MATHEW, DAY, and GRANTHAM, JJ.)

REG. v. BARKER. (a)

Indictment for non-repair of highway—Liability to repair ratione tenuræ—Indictment of owner of lands charged with repair—Continuance of liability during existence of turnpike trust—Destruction of subject-matter of liability by trustees—Liability to repair altered road.

An indictment for the non-repair of a highway will not lie against the owner of lands, the tenure of which carries with it the burden of repairing the highway, the occupier of such lands being the only person against whom such an indictment will lie. Where a highway becomes repairable by trustees under a Turnpike Act the common law liability to repair such highway (whether such liability rests with the inhabitants of the parish in which the highway is situate or with an individual ratione tenuræ) continues, in the absence of any enactment to the contrary, so

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

long as the highway remains similar in character to what it was up to the time of the passing of the Turnpike Act. If, however, the highway is so altered in character by the trustees, under the powers conferred upon them by the Turnpike Act, as to destroy what was the old highway, the common law liability is put an end to by operation of law.

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CASE stated by the Chairman of the Quarter Sessions for the county of Chester as follows:—

1. An indictment was presented to the grand jury at the quarter sessions held in and for the county of Chester, on the 17th day of October, 1889, against the defendant for the non-repair of two separate highways, and the grand jury returned a true bill.

2. In the first count of the indictment it was alleged that a certain part of a public highway situate, lying, and being in the township of Huntington, in the county of Chester, leading from the city of Chester towards and unto Farndon in the said county, and which said part beginning at a certain brook known as Huntington Brook, near the Butter Bache Farm, and continued towards and ending at Henlake Wood, was in length two miles and a quarter or thereabouts, was on the 16th day of October, 1889, and continually afterwards until the date of the taking of the inquisition, ruinous, miry, deep, broken, and in great decay for want of due reparation and amendment of the same, so that the liege subjects of the Queen could not and still could not go, return, pass, repass, ride, or labour on foot and with their horses, coaches, carts, and other carriages in, through, and along the said public highway aforesaid as they ought and were wont and were accustomed to do, without great danger to their lives and loss of their goods, to the great danger and common nuisance of all the liege subjects of our said Lady the Queen, going, returning, passing, repassing, riding, and labouring in, through, and along the said public highway, and against the peace of our said Lady the Queen, her crown and dignity, and that the defendant, by reason of his tenure of certain lands and tenements situate in the said township of Huntington, ought to repair and amend the same.

3. In the second count of the said indictment it was alleged that a part of another public highway situate, lying, and being in the township of Huntington, in the county of Chester, leading from Chester towards the village of Saughton in the said county of Chester, and which said part beginning at a junction with the Chester and Farndon Highway, at a spot called or known by the name of the Rake and Pikel, in the said county of Chester, and ending at the boundary of the township of Saughton, where the said boundary crosses the public highway, was on the 16th day of October, 1889, and continually afterwards until the taking of the inquisition, ruinous, miry, deep, broken, and in great decay for want of reparation and amendment of the same, so that

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the liege subjects of the Queen could not and still could not go, return, pass, repass, ride, or labour on foot and with their horses, coaches, carts, and other carriages in, through, and along the said public highway as they ought and were wont and were accustomed to do, without great danger to their lives and loss of their goods, to the great damage and common nuisance of all the liege subjects of the Queen going, returning, passing, repassing, riding, and labouring in, through, and along the said public highway, and against the peace of our Lady the Queen, her crown and dignity, and that the defendant, by reason of his tenure of certain lands and tenements situate in the same township of Huntington, ought to repair and amond the same.

4. The defendant pleaded not guilty, and the indictment was heard at the quarter sessions held in and for the said county of Chester, on the 13th day of December, 1889, when the defendant was found guilty upon both counts of the indictment, but the court reserved judgment and sentence pending the decision of certain points of law reserved for the consideration of the Court of Crown Cases Reserved.

5. The roads so alleged to be out of repair are both ancient highways.

6. As to the road mentioned in the first count, it was proved that before and until the passing of the Chester, Farndon, and Worthenbury Turnpike Road Act, 1854, it consisted of an ordinary fenced road, varying in width from about twenty to thirty feet, of which nine feet wide only was paved with stones along the centre; the sides not being metalled were of grass or earth. The stone of which the pavement was formed was got in the township from the lands alleged in the indictment to be charged with the repair of the way. The road, which was an ordinary carriage highway, was at that time repaired by John Brock Wood, the owner of the said lands, by reason of his being such owner, or his tenants.

7. The said Act of Parliament reciting that the formation and maintenance of a turnpike road from Chester by Farndon to Worthenbury with a branch to the village of Farndon would be of great public advantage, and that certain of the highways in the line of the said intended road and branch might advantageously be made available for the purposes thereof, enacted that the trustees appointed by the Act should have power to make and maintain the said intended turnpike roads respectively, in the lines and in and through the lands shown on the deposited plans, and to widen, alter, and divert, in the manner and to the extent shown on the said plans, the whole or parts of certain roads, including the roads mentioned in the first count of the indictment, and to stop up and discontinue such portions of the existing roads as would become unnecessary by reason of the said intended turnpike roads. The 29th section of the Act provided that, in case the tolls authorised to be taken by virtue of the said Act should be insufficient to answer the purposes set out in the 27th

section of the said Act, and the expenses of maintaining and keeping in repair the roads, the several townships and persons then by law liable, either *ratione tenuræ* or otherwise, to the repair thereof, should be and should continue liable to the maintenance and repair thereof in such and the same manner and to the same extent as such townships or persons were then liable by law to the maintenance and repair thereof. [The Turnpike Act accompanied and was to form part of the case.]

8. [The case here described, by reference to a plan which accompanied the case, the portions of the old road which had been diverted in forming the new road within the limits of that part in respect of which the defendant was alleged to be chargeable.] For the purpose of forming the new road the trustees took up the old pavement of nine feet wide, and converted the said road into a macadamised road, the part of the road that was so macadamised being about fifteen feet in width. There was no sufficient foundation provided for the macadamised road by the turnpike trustees. The stones of the old pavement were used in the construction of the macadamised road. The macadam was brought from Penmaenmawr and other places out of the county. The actual width of the road between the fences was not materially altered, and its width between the fences is now about the same as it was before it became a turnpike road.

9. There was no evidence that the said John Brock Wood contributed to the repair of the road during the continuance of the said Act, but on its expiration in the year 1876, acting as was alleged under a mistaken impression as to his liability, he repaired the same as a macadamised road, and continued to do so until the date of his death in the year 1885. The defendant, who is the devisee in trust of the said lands under the said John Brock Wood's will, continued to repair it under the belief that he was legally liable to do so until a few days before the trial of the indictment on the 30th day of December, 1889. There was no evidence that the township or parish had ever repaired the road, nor that anyone else had done so except the said John Brock Wood and the defendant since the expiration of the turnpike trust.

10. The defendant proved that the following sums had been expended by him for materials and labour in repairing the said road referred to in the first count of the indictment within the last three years: 1887, 155*l.*; 1888, 224*l.*; 1889, 206*l.* The expense of repairing the said road before the passing of the said Turnpike Act, as it mainly consisted of labour, must have been small.

11. It was contended for the prosecution that the defendant was liable to put the road mentioned in the first count into good repair as a macadamised road, the road having ceased to be a turnpike road, as he was the devisee in trust of the late John Brock Wood, the person liable to repair the road *ratione tenuræ* prior to the road becoming a turnpike road. The

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estimates for putting the said road referred to in the first count of the indictment into good repair varied from 698*l.* to 1043*l.* by the witnesses for the prosecution, and from 400*l.* to 450*l.* by the witnesses for the defendant.

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12. It was proved that the defendant was not the occupier of any of the lands mentioned in the indictment or of any lands whatever in the county of Chester, but that he was the owner of a considerable quantity of the land immediately abutting on both sides of the highway mentioned in the first count of the indictment, and also that he was the owner of the land immediately abutting on one side of the highway mentioned in the second count of the indictment.

13. It was proved as to the highway mentioned in the second count of the indictment, that it had always been repaired by the said John Brock Wood or his tenants, and the defendant as his devisee or his tenants, and there was no evidence whatever that the said township or parish, or anyone else, had ever repaired the said highway.

14. It was contended for the defendant that, as to the road mentioned in the first count of the indictment, the passing of the said Turnpike Act, and the alterations made in the old highway by the turnpike trustees by diverting it as shown on the plan, and by taking up the stone pavement of nine feet wide and converting the road into a macadamised road of fifteen feet wide, had so altered its character as to destroy any liability by tenure of the said John Brock Wood and the defendant as his trustee or their tenants that did not exist before the passing of the said Act. As to the roads mentioned in both counts, it was further contended that the defendant could not lawfully be found guilty, as he was not the occupier of any part of the lands in respect of the tenure of which he was alleged to be liable, but the owner only.

15. On behalf of the prosecution it was contended that, as regarded both roads, though the occupiers of the land might have been indicted for their non-repair, that as the owner was the person who derived the real benefit by having acquired the lands, and especially as he had always acknowledged his liability by undertaking their repair, there was no legal impediment to his being indicted for their non-repair; and, moreover, that this course was far preferable and more convenient than having to indict a number of people who had not as a fact ever repaired the said roads. As regarded the road referred to in the first count of the indictment the prosecution left themselves in the hands of the court, but pointed out that, before indicting the defendant, they had requested the Chester County Council to repair the road referred to in the first count of the indictment as a main road, but they had refused to do so, alleging that by virtue of the 97th section of the Local Government Act, 1888 (51 & 52 Vict. c. 41) they were not bound to do so.

16. The jury found that the said roads were out of repair; that

the road mentioned in the first count, before it was converted into a turnpike road had a stone pavement of nine feet wide in the centre, with grass or earth sides, and that it was then altered by the turnpike trustees, as shown on the said plan accompanying this case, and by their taking up the said pavement and converting the road into a macadamised road as hereinbefore described and (subject to the two points of law hereinbefore mentioned) they found the defendant liable to repair both the said roads by reason of his holding lands.

If the court were of opinion that the defendant was not liable to repair the said roads owing to his not being an occupier of any part of the lands mentioned in the indictment, a general verdict of not guilty was to be entered. If the court were of opinion that as to the road mentioned in the first count of the indictment the contention of the defendant was right with reference to the effect of the passing of the Turnpike Act, and the alterations of the road made thereunder, a verdict of not guilty to that count was to be entered. On the other hand, if the court were of a contrary opinion on both points, a general verdict of guilty was to be entered; but if, on the first point only, a verdict of not guilty on the first count, and guilty on the second count was to be entered.

F. Marshall, on behalf of the defendant.—Inasmuch as the trustees were to maintain the roads made by them, and power was given to them to call upon those persons who previously were liable to maintain the roads in the event only of the funds under the Act proving insufficient, no liability *ratione tenuræ* could arise during the currency of the Turnpike Act until there was such a deficiency, and then only to the extent and in the same manner as previously to the Act (see sects. 27 and 29 of the Turnpike Act). It was clear that no greater liability attached to the defendant previously to the Turnpike Act than that of maintaining the road to the extent of nine feet in width with native stones from his own lands. The extent of his liability was evidenced by immemorial usage, and if the Act had not passed he could not have been subjected to any greater liability. Had the funds proved deficient during the existence of the Act, no doubt a very difficult question would have arisen as to the extent of the defendant's liability; but the words of the Act were distinct that he was only to be liable to the same extent as before the Act. In *Reg. v. Pickering* (41 J. P. 564) it was held, where a horse and pack way three feet wide had been made under a Turnpike Act into a cart and carriage way of fifteen yards wide, that, upon the expiration of the trust, the township were alone liable to repair the road so made, the original liability of the tenants of certain lands to repair the horse and pack way *ratione tenuræ* having been extinguished by the alteration which had taken place. If the General Turnpike Acts are referred to it appears that the Legislature never intended to increase a liability which existed previously to their being applied to a road (see

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4 Geo. 4, c. 95, s. 68). [Lord COLERIDGE, C.J.—Was it not held a long time ago that the liability of the inhabitants to indictment in respect of the non-repair of a turnpike road continued notwithstanding the Turnpike Act?] Yes; that was in *Reg. v. St. George, Hanover-square* (3 Camp. 222). [Lord COLERIDGE, C.J.—Does it not follow, then, that where an individual is liable *ratione tenuræ* and not the inhabitants, you may indict such individual notwithstanding the existence of the Turnpike Trust?] That he might be indicted it is apprehended there can be no doubt; but it is contended that he cannot be compelled to do any greater repair than that to which he was liable before the trust was created. In *Reg. v. Cleworth* (6 Mod. 163) Holt, C.J. said: “If a man be bound by prescripton to repair a way he is not bound to put it into better repair than it has been in time out of mind before.” That doctrine was applied in *Reg. v. The Inhabitants of Surrey* (2 Camp. 455) and *Reg. v. The West Riding of Yorkshire* (2 East, 352, n.); and in *Reg. v. The Inhabitants of Middlesex* (3 B. & A. 201), where the proprietors of certain abbey lands were liable *ratione tenuræ* on their part to maintain a bridge, it was held that they were not liable to repair a footway which had been added to such bridge by turnpike trustees. No doubt the defendant and his predecessors here had repaired this road since the expiration of the turnpike trust, but they had done so under a mistaken notion as to their liability, and in *Reg. v. Edmonton* (1 M. & R. 24) Lord Tenterden, C.J. directed a jury that, though the inhabitants of a parish had repaired a highway for twenty years, yet they would not be bound to continue such repairs if the jury were satisfied that the repairs had been begun and continued under a mistaken notion on the part of the inhabitants of their liability to repair. There was no evidence in this case as to what it would cost to repair the road in its former condition, and it could hardly be contended that the defendant was bound to restore it to such condition. If the old road existed to-day the defendant would be liable to repair it; but the old road having been destroyed, and the repair of the new road being an entirely new obligation, no liability rests upon the defendant to repair it. There was a second point, namely, that the defendant was not the occupier of any lands in the county, but was merely the owner of the lands which were charged with the repair of the old road. He was not, therefore, liable to be indicted for the non-repair of the road whatever the liability as to its repair might be (see Rolle’s Abr. tit. “Chimin Common” (B) (2)). [He was here stopped by the Court.]

E. H. Lloyd for the prosecution.—As to the second point in *Reg. v. Lamsdon* (E. B. & E. 949) Erle, J., at p. 954, said, with reference to the passage cited from Rolle’s Abridgment: “As this placitum follows that relating to liability by reason of inclosure, I think it relates to the same liability.” There was good reason for the occupier and not the owner being liable to indictment in that case, for the liability to repair only continues

so long as the land remains inclosed. In the case of a liability *ratione tenuræ* there was no such reason, and though no doubt the occupier might be indicted, and was primarily liable to do the repairs, the decision in *Baker v. Greenhill* (3 Q. B. 148) showed that the owner was really the person who was liable, for it was there held that the occupier could recover the expense of repairing from the owner. The occupier was primarily liable for the convenience of the public, who might not be able to discover the owner; but where the owner was known there was no reason why he should not be indicted in the first place, instead of indicting the occupier and leaving him to his remedy against the owner. In *Rez v. Sutton* (3 A. & E. 599; 5 Nev. & M. 353; Har. & Woll. 428) it was held that an indictment for the non-repair of a bridge *ratione tenuræ* would not lie against an infant who had inherited lands charged with the repairs of the bridge. But that was because he was not the owner of the legal estate, which was in his guardian in socage. In *Reg. v. Watts* (1 Salk. 377) no question of repairs of a highway arose at all; it was the case of a nuisance adjoining a highway, with regard to which the occupier could clearly be the only person liable. In *Reg. v. Bucknell* (7 Mod. 55), though it was held that an indictment against the lord of a manor for the non-repair of a bridge was bad, that was because as lord of the manor he was under no obligation to repair, and the indictment omitted to state that he was liable *ratione tenuræ* or by prescription. But the court never expressed a doubt that the indictment would have been good had it stated such a liability. With reference to the first point, the common law liability was not put an end to by the operation of a Turnpike Act in the case of the inhabitants of a parish (see *Reg. v. St. George, Hanover-square, ubi sup.*); and that applied equally to the case of an individual liable at common law *ratione tenuræ*; and 3 Geo. 4, c. 126, s. 110, showed that the common law liability exists, and that such a case as the present was contemplated, for it provides for the apportionment of the fine imposed on indictment between the inhabitants and the trustees. The defendant was clearly indictable during the continuance of the trust, and the expiration of the trust could make no difference in his liability to indictment. The fact of the road having been altered merely affected the degree of the defendant's liability, which could be taken into consideration in the amount of the fine, which would be commensurate with such liability.

LORD COLERIDGE, C.J.—This is a case which raises some interesting questions, but I am not able to bring my mind to entertain any reasonable doubt with regard to it. I will take the last point first, as that is one which relates to the whole indictment. This is an indictment against a gentleman for not repairing a road, which it is alleged he is liable to repair *ratione tenuræ*, and the objection taken is, that from very early times such an indictment as this must be preferred against the person

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who occupies the land upon which the burden is cast of repairing the road in dispute. Here there is no question but that there was the burden of repairing some portions of the roads on Mr. Wood and his predecessors *ratione tenuræ*, and the indictment is now laid against the successor who represents Mr. Wood, on whom it is alleged the burden of repairing the road now rests *ratione tenuræ*. But he is the owner, and not the occupier of the lands subject to the burden, and since the time of Rolle's Abridgement and the case cited there, and decided in the reign of Charles I., the occupier, and not the owner, has been the person who is indictable for the non-repair of a highway *ratione tenuræ*. The passage in Rolle's Abridgement [title "Chimin Common" (B) 2] lays it down both negatively and affirmatively that you cannot indict the owner, and that you must indict the occupier, and that is undoubtedly the law at the present day. There the owner was indicted, or rather it was proposed that he should be indicted, and the King's Bench prohibited the laying of the indictment on the express ground that the occupier, and not the owner, was the person liable to indictment. Now, it is sometimes said that a dictum loses its authority by repetition; but if you find a dictum of Lord Coke repeated in the same words by Lord Hale and again by Lord Coke, the dictum does not stand on the authority of Lord Coke only; it is supported by the authority of all the learned judges who may have repeated it, without expressing any doubt as to its correctness, and it is an authority that the law of their time was as stated. This passage has been repeated over and over again, and in the case in Salkeld (*Reg. v. Watts*, 1 Salk. tit. "Highways" 357) the reason for it is given, and a very good reason it is, too, namely, that there is a public nuisance; as the danger is the matter that concerns the public, they are to look to the occupier, and not to the estate, for it does not give the public proper remedy if the owner, of whom the public know nothing, is to be found. On that ground, therefore, it is plain that the whole of the indictment is wrong, and that the conviction must be quashed. But that does not dispose of the graver question, because that could be set right by the indictment of the occupier. I think, therefore, that this court should not shrink from deciding the graver question, and so putting the parties to the expense of trying the whole question over again. The graver question raised by the case is, whether, under the circumstances of this case, any person is liable *ratione tenuræ* to repair the road which is out of repair. The circumstances, as I understand them, are these: there was an old road which went in a serpentine course in the country, and this gentleman and his predecessors had been liable time out of mind to repair, and they had repaired the road. Then there comes into existence a Turnpike Act which contains certain powers of widening, altering, and diverting the whole or parts of certain roads and stopping up and discontinuing such portions as would become unnecessary by reason of the making of certain turnpike roads; and the

road in question is one of the roads in respect of which such powers were given to the turnpike trustees. Now, the trustees in the exercise of their powers do not leave the road in the condition in which they find it. They very much alter it, and, instead of the old narrow paved road which Mr. Wood and his predecessors were bound to keep up, they widen it and alter its character, they take up the paving stones and make it a macadamised road, and (though I do not say for a moment that they in any way exceeded their powers) they actually stopped up some portions of the old road. In fact they substantially altered the old road. The road so altered gets out of repair, and the defendant is indicted for not repairing it. That being the state of the facts, what are the principles of law applicable to such facts? Primarily there is no doubt that in the case of a Turnpike Act, although it imposes a special statutory duty on the trustees to maintain the road, and contains certain provisions by means of which those persons may no doubt be compelled to do their duty, it has been held long ago that Acts of this kind do not destroy any common law liability which existed on the part of any person before the Act. And as regards the public, who cannot be supposed to know about Turnpike Acts, they have the same rights as before; that was decided, in *Reg. v. St. George, Hanover-square* (3 Camp. 222), to have been the law before that case, and it has been the law ever since. There the indictment was against the inhabitants of a parish, but I apprehend that the principle is equally applicable to the case of a person who is liable at common law to repair *ratione tenure*, and I can easily imagine the case of a road for half a mile of its length being repairable by the inhabitants, and for another half a mile of its length being repairable by a private individual, and there the common law liability would not be destroyed by the Act of Parliament, but would remain in such case as before. Had then the trustees here left the portion of the road alone, I do not doubt Mr. Wood and his representatives would be liable. But the road is altogether changed and the whole subject-matter of the liability is absolutely destroyed. The road, as it was, no longer exists; it is no longer between the same termini, it is no longer of the same character, and that which he was, previously to the Turnpike Act, bound to repair *ratione tenure* has disappeared, and something totally different from that which he was bound to repair now exists, and there is no liability to repair the new thing which does exist. He is therefore set free by operation of law from his liability. I prefer to put it on that broad ground, and not to put it on the narrower ground which is to be found in the old cases, namely, that the only liability of the defendant is to repair to the extent to which his predecessors were previously liable to repair, inasmuch as it would be very difficult to distinguish the extent to which the old liability existed, and it would be very difficult to carry out. There is no doubt a great deal to support that view. There is a dictum in Comyn's Digest to the effect that, if

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a parish is bound to repair, it is not bound to pave, because the duty is not to pave but to repair, and you cannot impose a heavier duty on a person at common law than that which he is liable to perform. But I prefer to put my judgment on the broader ground that, although the law preserves the common law liabilities if those common law liabilities remain the same after the ceasing of the Turnpike Act, or even during its currency, I think that the liability does not remain where the subject-matter of the liability is completely destroyed, and its character changed. I am therefore of opinion that this conviction is bad and must be quashed.

The other judges concurred.

Conviction quashed.

Solicitors for the prosecution, *Tatham* and *Proctor*, for *Carrington* and *Barker*, Chester.

Solicitors for the defendant, *Ounliffes* and *Daw*, for *Churton*, Chester.

MIDLAND CIRCUIT.

DERBY AUTUMN ASSIZES.

Dec. 12, 1889.

(Before WILLS, J.)

REG. v. ELIZABETH AND JAMES MARTIN. (a)

Practice—Joint indictment—No case against one prisoner—Discharge of such prisoner, when the other elects to give evidence—52 & 53 Vict. c. 44, s. 7.

A person jointly indicted with another under 52 & 53 Vict. c. 44, s. 7, but against whom no case is made out, is, nevertheless, not entitled to be discharged at the close of the case for the prosecution where the other person charged elects to give evidence.

SECT. 7 of 52 & 53 Vict. c. 14, is as follows :

In any proceeding against any person for an offence under this Act, such person shall be competent but not compellable, and the wife or husband of such person may be required to attend to give evidence as an ordinary witness in the case, and shall be competent, but not compellable, to give evidence.

(a) Reported by J. P. MELLOR, Esq., Barrister-at-Law.

The prisoners, husband and wife, were jointly indicted under sect. 1 of the above Act for having wilfully neglected and ill-treated a child.

E. W. Garrett for the prosecution.

W. B. Hextall for the husband.

The wife was undefended.

At the close of the case for the prosecution, *Hextall* submitted that there was no case made out against the husband, and the judge so held.

Hextall then asked that he should be discharged as at the close of the case for the prosecution he should be of right.

The wife elected to give evidence.

The judge thereupon held that, the wife electing to go into the witness box, the case was not over and the husband must remain in the dock and take his chance of the wife's evidence making against him.

Verdict, Both Not guilty.

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MARTIN.

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*Practice—
Joint indictment—Elec-
tion by one
prisoner to
give evidence
—Failure of
case against
the other—
Right of
such other
prisoner to
immediate
discharge.*

MIDLAND CIRCUIT.

DERBYSHIRE WINTER ASSIZES.

Monday, March 14, 1890.

(Before J. S. DUGDALE, Q.C., sitting as Commissioner.)

REG. v. EVANS. (a)

Practice—Evidence—Perjury—Licensed premises—Proof of licence—35 & 36 Vict. c. 94, s. 18.

On the trial of a charge of perjury alleged to have been committed before justices on the hearing of an information under section 18 of the Licensing Act, 1872, against the defendant for being disorderly on and refusing to quit licensed premises, the licence itself must be produced in order to show that the premises were licensed, and, therefore, that the justices had jurisdiction.

THE prisoner was indicted for having committed wilful and corrupt perjury at the hearing before the justices of a charge against himself of having been disorderly on and refused to quit licensed premises, and upon which he gave evidence on his own

(a) Reported by J. P. MELLOR, Esq., Barrister-at-Law.

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behalf under the provisions of sect. 4 of the Licensing Act above mentioned.

The perjury was alleged in the indictment to have been committed upon the hearing of a "certain information, charge, and complaint against Henry Evans, in substance and to the effect that he the said Henry Evans, on the 8th day of December, &c. . . . was disorderly on the premises of one Wm. Barton, then licensed for the sale of intoxicating liquors by retail to be consumed on the premises, and unlawfully did refuse to quit the said premises when requested so to do by the said William Barton, the landlord, came on to be heard, and was then and there duly and lawfully heard and enquired into by and before Edward Wilson Barnes, Esq., and William Parker, Esq., two of Her Majesty's Justices of the Peace for the said division and county, then and there lawfully acting as such justices of the peace in petty sessions and that at and upon the said hearing and investigation of the said information, charge, and complaint, the said Henry Evans did appear before the said justices of the peace as a witness to give evidence for and in his own behalf, &c."

And the assignments of perjury were that he had sworn, "I was not requested to leave. I did not take my coat off. I was not put out."

By sect. 18 of the Licensing Act, 1872, it is enacted that:—

Any person may refuse to admit, and may turn out of the premises, in respect of which his licence is granted, any person who is drunken, violent, quarrelsome, or disorderly, and any person whose presence on his premises would subject him to a penalty under this Act.

Any such person who, upon being requested, in pursuance of this section by such licensed person, or his agent or servant, or any constable, to quit such premises, refuses or fails so to do, shall be liable to a penalty not exceeding five pounds, &c.

Sect. 51 of the same statute provides that:—

. . . In all cases of summary proceedings under this Act, the defendant and his wife shall be competent to give evidence.

Upon the close of the case for the prosecution

Hextall, on behalf of the defendant, submitted that there was no case, inasmuch as the prosecution had not proved the jurisdiction of the justices to hear and determine the information. The only evidence that the premises were "licensed premises" within the meaning of the Licensing Acts, being the statement of the landlord in the box. He submitted that the licence itself must be produced, and that secondary evidence of its contents could not be admitted. He cited *Reg. v. Lewis* (12 Cox C. C. 163).

Hammond Chambers, for the prosecution, contended that as no question had been raised before the justices, the point as to the licence must be taken to have been for ever waived, and further that the case here was distinguishable from *Reg. v. Lewis*, inasmuch as it was not (as in that case) a charge against the holder of the licence.

The learned COMMISSIONER.—Is it material that the words “licensed premises” should be stated?

Hammond Chambers.—Yes.

The learned COMMISSIONER.—Then you have not proved them.

The learned COMMISSIONER, after consulting Pollock, B., said that the opinion of the learned Baron confirmed his own, that, inasmuch as it was material to the charge that the premises should be “licensed,” and as no evidence of that was here given by the prosecution, he must direct the jury to acquit the prisoner.

Verdict, Not guilty.

Solicitors for the prosecution, *Shipton, Halliwell, and Co.*, Chesterfield.

Solicitors for defence, *Jones and Middleton*, Chesterfield.

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1890.

*Practice—
Evidence—
Perjury—
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material
allegation.*

MIDLAND CIRCUIT.

DERBYSHIRE ADJOURNED ASSIZES.

April 1st, 1890.

(Before HAWKINS, J.)

REG. v. DYTCHÉ AND OTHERS. (a)

Practice—Evidence—Alibi—Admissibility of evidence of other persons alleged to have been wrongly convicted in former prosecution for the offence.

Where evidence is given that persons previously convicted of an offence, which is now charged to have been committed by the prisoner at the bar, were in fact the guilty parties, the evidence of such convicted persons, though establishing only their own alibi, is admissible.

JOHAN DYTCHÉ, Henry Dytché, Alfred Tunnicliffe, and Frederick Burton, were indicted for feloniously wounding Police Constable James Ely, at Hungry Bentley, on the 9th of November, 1889.

J. S. Dugdale, Q.C. and W. B. Hextall prosecuted.

Stanger defended.

At the Derbyshire Assizes, in December, 1889 (before Wills, J.), four men, named Thomas Shaw, William Shaw, James Williamson, and Robert Smith, were indicted for the same offence, viz.,

(a) Reported by J. P. MELLOR, Esq., Barrister-at-Law.

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for same
offence after
alleged
wrongful con-
viction of
other persons
—Admissi-
bility of evi-
dence of con-
victed persons
to establish
their own
alibi.

an assault on a police constable, which had been committed by a gang of men engaged in night poaching, and convicted and sentenced to five years penal servitude each. Their defence had been an *alibi*.

After the trial, it was alleged that the present prisoners had in fact committed the offence, and that the four men previously convicted were innocent; and on materials laid before the Treasury a prosecution of the present prisoners was instituted, the chief evidence against them being their own statements to various persons, admitting that they were guilty parties, and that the four convicts were not at the *locus in quo* at all.

The magistrates committed the four prisoners for trial; the evidence of each convict being tendered before them to the effect that he was elsewhere on the night in question, and wholly innocent. The justices admitted the evidence, and it was taken and marked upon the deposition as objected to. The four convicts were undergoing their sentences in due course of law.

At the assizes, the prosecution called as witnesses police-constable Ely (on whom the assault had been committed) and a gamekeeper (Sparks) who was with him at the time, both of whom had given evidence as to identity at the former trial; but no questions were asked of them by the prosecuting counsel as to who were the persons who assaulted the police-constable.

In cross-examination, both these witnesses now (as at the former trial) spoke to the identity of the convicts, and stated that the four present prisoners were not the guilty parties. The prosecution then proposed to call the four convicts to prove that they were not present, and so were not the guilty parties as alleged.

Stanger, on behalf of the prisoners, objected, on the ground that the guilt or innocence of the four convicts was not the question at issue, even if it were shown conclusively that they were not the men who assaulted the police-constable, it would not be relevant evidence against the prisoners.

Dugdale, Q.C. (with him *W. B. Hextall*), on behalf of the prosecution, submitted that the police-constable and the gamekeeper having in cross-examination stated that the four convicts were the guilty persons and not the four prisoners, the evidence of the convicts that such was not the case had become relevant, though it went only to their own absence from the scene of the offence.

HAWKINS, J. intimated that his impression was that, under the circumstances, the evidence was admissible, but would give his decision later.

Next day (April 2) *HAWKINS*, J. stated that he had considered the question and should admit the evidence.

The four convicted men then gave evidence to the effect above stated.

Solicitor for the prosecution, *F. Stone*, Derby, agent for *The Solicitor to the Treasury*.

CHANCERY DIVISION.

March 11, 12, and May 13, 1890.

(Before STIRLING, J.)

WINDHILL LOCAL BOARD OF HEALTH v. VINT. (a)

*Compounding misdemeanour — Compromise of indictment for nuisance to highway — Illegal consideration — Specific performance.**An agreement to compromise an indictment for a nuisance is not less illegal than an agreement to compromise a prosecution for any other criminal offence.**Dictum of James, L.J. in Fisher v. Apollinaris Company (32 L. T. Rep. N. S. 628; L. Rep. 10 Ch. 297) not followed.**The defendants in the course of working certain quarries had obstructed a highway in the district of the plaintiffs. The plaintiffs thereupon indicted the defendants for the obstruction, but before the case was heard a compromise was entered into, under which the defendants agreed to restore the highway within a limited time, and the plaintiffs agreed that the indictment should during such time lie in the office of the court, and that upon the work being completed they would consent to a verdict of "not guilty" on the indictment. The highway not having been restored as agreed, the plaintiffs commenced the present action for specific performance by the defendants of the terms of the compromise.**Held, that the agreement was founded on an illegal consideration, and could not therefore be enforced. (b)*

THIS was an action for the specific performance of the covenants contained in a certain indenture of the 9th day of November, 1880, and made between the defendants of the first part, George Vint of the second part, and the plaintiffs of the third part, or in the alternative for damages for breach of such covenants. The defence was, that the covenants were founded upon an illegal consideration.

At the Leeds Summer Assizes in 1880 the present defendants were indicted, on the prosecution of the present plaintiffs, for obstructing a highway called Gaisby Lane, within the district of Windhill, in the county of York, by digging or excavating a

(a) Reported by L. S. BRISTOW, Esq., Barrister-at-Law.

(b) This decision was affirmed on appeal by Cotton, Fry, and Lopes, L.JJ. See 89 L. T. 237.

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sideration—
Specific
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stone quarry to a great depth for the whole width of the highway. The defendants pleaded "not guilty."

By a memorandum in writing signed by the solicitors for the plaintiffs and defendants respectively, and initialled by their respective counsel, and dated the 14th day of August, 1880, it was agreed (among other things) that the defendants should within seven years from the date thereof restore Gaisby Lane in manner therein mentioned, and maintain the road for twelve months after it was restored and opened to the public; that until Gaisby Lane was restored the existing road should be maintained by the defendants as therein mentioned, and that on the foregoing conditions the indictment should lie in the office of the court as a security for the observance of the terms by the defendants, and that such terms should, if required by either party, be embodied in an indenture between the plaintiffs and the defendants, and that when the said terms were fulfilled, a verdict of "not guilty" should be consented to by the plaintiff board.

At the trial the court approved of the terms contained in the memorandum, and ordered that the indictment should lie in the office accordingly.

On the 9th day of November, 1880, an indenture was executed between the defendants of the first part, George Vint of the second part, and the plaintiffs of the third part, which embodied the provisions of the above-mentioned agreement. By that deed the defendants covenanted within seven years from the 4th day of August, 1880, to restore Gaisby Lane as therein mentioned, and that until Gaisby Lane had been so restored, the defendants would maintain the existing road as therein mentioned, and that as soon as the stipulations and conditions thereinbefore contained had been fulfilled, the plaintiff board would consent to a verdict of "not guilty" being entered upon the indictment.

The period fixed by the deed having elapsed and the defendants not having restored the highway, this action was commenced.

It appeared from the evidence that George Vint, the father of the present defendants, formerly carried on business in partnership with his brothers under the firm of George Vint and Brothers, and that in 1861 the firm began to work the quarries on the east and west sides of the highway in question. The quarry on the west side of the road was held under a lease for thirty years from April, 1860; the quarry on the east side was originally also held under a lease, but in 1864 or 1865 the firm acquired the freehold.

Some time about 1861 an arrangement was made between the then highway board for the district (of which George Vint was a member) and the firm, that the latter should divert the highway in question, and should then be at liberty to work the stone under the highway. A diverted road was accordingly constructed at the expense of the firm; but the diversion was never legally carried into effect, and Gaisby Lane continued to be a public highway.

In 1873 George Vint's partners retired. George Vint thereupon became the owner of the quarries, and continued to carry on the business without a partner until 1878, when he also retired. He was succeeded by his sons, the present defendants, to whom he agreed to give a lease of the quarry on the east side of the road for ten years.

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It was admitted by the defendant, Samuel Walter Vint, in examination, that in 1880 he and his brother were working the quarry on the site of the road.

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Hastings, Q.C. and *Bardswell* for the plaintiffs.

Fischer, Q.C. and *R. Cunningham Glen* for the defendants.—
The following cases were cited: (*Fallowes v. Taylor*, 7 Term Rep. 479; *Keir v. Leeman*, 7 L. T. Rep. O. S. 347; 6 Q. B. 308; 9 Q. B. 371; *Fisher v. Apollinaris Company*, 32 L. T. Rep. N. S. 628; L. Rep. 10 Ch. 227.

Cur. adv. vult.

May 13.—STIRLING, J. stated the facts, and continued:—
Under these circumstances I apprehend that there was no real defence to this prosecution. In my opinion, however, there is no ground for supposing that it was intended by the agreement of the 4th day of August, 1880, to do anything unlawful. I believe that agreement was come to solely in order to avoid the appearance of harsh conduct on the part of the public body which initiated the proceedings. I have no doubt that the facts were fully brought to the notice of the presiding judge, and I think that his approval given under such circumstances is strong evidence of the good faith of the parties. Nevertheless, neither the good intentions of the prosecutors and defendants nor the approval of the judge will avail if in fact the consideration for the agreement was illegal. This is plain from *Keir v. Leeman (ubi sup.)*. Now, part of the consideration for the promises of the defendants was the agreement of the plaintiffs (the prosecutors on the indictment), that when and so soon as the stipulation thereinbefore contained had been fulfilled, they would consent to a verdict of "not guilty" being entered on the indictment. It is alleged that this is not a lawful promise. In *Fallowes v. Taylor (ubi sup.)* the settlement out of court of an indictment for an obstruction to a river, preferred by a public body, was held to be a lawful consideration for a bond binding the defendant to remove the nuisance. This case, if it were still a binding authority, would govern the present. It was, however, considered and commented upon by the Exchequer Chamber in *Keir v. Leeman (ubi sup.)*. There Tindal, C.J., in delivering the judgment of the court, said: "In *Drage v. Ibberson* (2 Esp. 643) Lord Kenyon adverted to, and stated that he should adhere to, the class of cases which held that the consideration for an agreement being the settling of a misdemeanour might be good in law. Thus a settlement of an indictment for a nuisance preferred by a public authority was held (*Fallowes v. Taylor, ubi sup.*) a lawful consideration for a bond binding the defendant to remove the

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nuisance; we presume, on the ground which, however, is not very satisfactory, that the main object of the prosecution, the removal of the nuisance, was thereby effected. But the court seem to have overlooked the consideration that a defendant who had infringed a public right was thereby entirely freed from the punishment due to a violation of public law. In *Edgcombe v. Rodd* (5 East, 294) Le Blanc, J. assigns this as a reason for the consideration being illegal, that there the prosecution was for a public misdemeanour and not for a private injury to the prosecutor. It is difficult to reconcile this principle, which we think a just one, with the decision in *Fallowes v. Taylor* (*ubi sup.*); nor can *Pool v. Bousfield* (1 Camp. 55) be reconciled with it. There an agreement to stifle a motion against the defendant that he should answer the matters of an affidavit was held illegal. . . . Indeed, it is very remarkable what little authority there is to be found, rather consisting of *dicta* than decisions, for the principle that any compromise of a misdemeanour, or indeed of any public offence, can be otherwise than illegal, and any promise founded upon such a consideration otherwise than void. If the matter were *res integra* we should have no doubt on this point. We have no doubt that, in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit. It is said, indeed, that, in the case of an assault, he may also undertake not to prosecute on behalf of the public. It may be so; but we are not disposed to extend this any farther." On the other hand, in *Fisher v. Apollinaris Company* (*ubi sup.*), James, L.J. says (at p. 302): "This is one of those misdemeanours where the person injured has the choice between a civil and a criminal remedy. It was no more a violation of the law to accept an apology in such a case than it would be to compromise an indictment for a nuisance, or for not repairing a highway on the terms of the defendants agreeing to remove the nuisance or repair the highway. Offences of this kind are indictable, but it is not against the policy of the law to allow the injured person to enter into a compromise with regard to them." It is, however, to be observed that those observations were not necessary to the decision of the case, that *Keir v. Leeman* was not referred to, and that Mellish, L.J. did not express any concurrence with them. Notwithstanding the weight due to any observations which fell from James, L.J., I consider that I am bound to follow the principle laid down by Tindal, C.J., "that any compromise of a misdemeanour, or indeed of any public offence, is illegal." That principle evidently, in the opinion of his Lordship, extended to the compromise of nuisances where the public law was violated. In the present case the compromise was of the subject matter of an indictment which was both a misdemeanour and a public offence. The stipulation which constituted the consideration for the defen-

dants' promises was to consent to a verdict of not guilty, being in substance an engagement having a tendency to affect the administration of justice; and this (as was laid down by Lord Lyndhurst in *Egerton v. Brownlow*, 21 L. T. Rep. N.S. 306; 4 H.L. Cas., at p. 163) is illegal and void. In my opinion the consideration was illegal, and I am therefore compelled to dismiss the action, but under the circumstances without costs.

Solicitors for the plaintiffs, *Jacques and Co.*, agents for *Lancaster and Wright*, Bradford.

Solicitors for the defendants, *W. and J. Flower and Nussey*, agents for *Killick, Hutton, and Vint*, Bradford.

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QUEEN'S BENCH DIVISION.

April 28 and 29.

(Before HUDDLESTON, B. and GRANTHAM, J.)

REG. v. THE JUSTICES OF GLAMORGANSHIRE. (a)

Justices—Appeal from summary conviction—Recognisance entered into too late—Costs of Appeal—Appellant's liability for—Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49, s. 31, sub-sects. 2 and 3).

An appeal from a summary conviction was dismissed with costs by the Court of Quarter Sessions on the ground that the court had no jurisdiction to entertain it, as the appellant had not entered into a recognisance within three days after the day on which he gave notice of appeal, as required by sect. 31, sub-sect. (3) of the Summary Jurisdiction Act, 1879. On the refusal of the appellant to pay the costs of the appeal as ordered, the Court of Quarter Sessions directed that his recognisance should be estreated.

Held, that the justices were right in estreating the recognisance on nonpayment of the costs of the appeal.

THIS was a rule *nisi* for a *certiorari* to bring up and quash an order made by certain justices of Glamorganshire, by which a recognisance entered into by the appellant was estreated for his not having paid the costs of a certain appeal.

(a) Reported by ALFRED H. LEFROY, Esq., Barrister-at-Law.

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The appellant having been convicted of an offence against sect. 3 of the Licensing Act, 1872 (35 & 36 Vict. c. 94) gave notice, on the 6th day of July following, under sect. 31, sub-sect. (2), of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), of an appeal against such conviction. The appellant did not, however, enter into a recognisance as required by sub-sect. (3) of that section until the 12th day of July. At the quarter sessions holden next after such notice the appeal was called on, and the appellant appeared, and was represented by counsel. On the point being taken by the counsel for the prosecution that the appellant had not entered into a recognisance within three days after the day on which he gave notice of appeal, the appeal was dismissed with costs, on the ground that the Court of Quarter Sessions had no jurisdiction to entertain it. The costs were duly taxed, but not having been paid after application made to the appellant and his sureties, the prosecution, at the following court of quarter sessions, holden at the end of December, moved that the recognisance should be estreated. The court held that, although the recognisance had been entered into too late for the purpose of appeal, it remained in force until the order of the Court of Quarter Sessions was obeyed, and accordingly directed that the recognisance should be estreated. The appellant obtained a rule *nisi* for a *certiorari*.

Sect. 31 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), sub-sect. (3), provides as follows:

The appellant shall, within the prescribed time, or if no time is prescribed within three days after the day on which he gave notice of appeal, enter into a recognisance before a court of summary jurisdiction, with or without a surety or sureties as that court may direct, conditioned to appear at the said sessions and to try such appeal, and to abide the judgment of the Court of Appeal thereon, and to pay such costs as may be awarded by the Court of Appeal; or the appellant may, if the court of summary jurisdiction before whom the appellant appears to enter into a recognisance think it expedient, instead of entering into a recognisance, give such other security, by deposit of money with the clerk of the court of summary jurisdiction or otherwise as that court deem sufficient.

W. D. Benson, for the respondents, showed cause.—The justices were right in estreating the recognisance. The appeal, although disposed of on a technical objection, had nevertheless been heard, and the Court of Quarter Sessions had jurisdiction to order the payment of costs: (*Reg. v. Padwick*, 8 El. & Bl. 704; 27 L. J. 113, M. C.) The recognisance was in the form given in Archbold's Quarter Sessions, 4th edit. p. 665, as required by the Summary Jurisdiction Act, 1879, sect. 31, sub-sect. 3, and amounted to a Crown debt, which could only be extinguished by fulfilling the obligation mentioned, namely, to abide the judgment of the court and pay the costs of the appeal.

Abel Thomas, for the appellant, in support of the rule.—There was no right of appeal at all, and no appeal lay in this case at the time when the recognisance was entered into by the appellant and his sureties; it was therefore of no validity whatever. The appellant on such an appeal must prove that he

has fulfilled all the obligations imposed by statute; otherwise he cannot be heard. In this case, even if no objection had been taken by the prosecution, the appeal could not have been entertained, as the Court of Quarter Sessions have no jurisdiction to hear an appeal unless the conditions prescribed by the statute have been performed. He cited *Rex v. The Justices of Oxfordshire* (1 M. & S. 446); *Rex v. The Justices of Lincolnshire* (3 B. & C. 548.)

HUDDLESTON, B.—In this case Mr. Thomas has brought before us all the authorities and arguments which can be found to support his contention. The facts appear to be that, in July last, a man named Elliott was convicted of selling beer without a licence, and availed himself of the provisions of the Summary Jurisdiction Act, 1879, sect. 31, sub-sects. (2) and (3), to endeavour to upset that conviction. In appealing, however, he failed to comply with certain conditions required by the Act of Parliament. The hearing took place before the October quarter sessions, and the objection was taken by the counsel who appeared for the prosecution that the recognisance had not been entered into within the time prescribed by the statute. The justices held that this was a valid objection, and accordingly dismissed the appeal. The costs of appeal were taxed, but were not paid, and at the following quarter sessions application was made to the court to estreat the recognisance, and an order was made to that effect. We are now asked by Mr. Thomas to make absolute this rule *nisi* for a *certiorari* to quash that order. Now sect. 31, sub-sect. (3), of the Summary Jurisdiction Act, 1879, requires that this recognisance shall be entered into within three days after notice of appeal, and the form states that the appellant becomes indebted to the Crown, he and his sureties, in a specified sum. That bond is defeasible only in the event of the appellant appearing at the quarter sessions, trying such appeal, abiding the judgment of the Court of Appeal thereon, and paying such costs as may be awarded by the Court of Appeal. The appellant in this case has appealed, and the court have pronounced judgment, but he has not paid the costs which have been awarded. It has been suggested that the case was never heard on appeal, but the justices had to try whether the appellant had complied with the conditions of the statute; they did so, and found that he had not. The meaning of this recognisance is clear. In Burn's Justice of the Peace (30th edit.), an authority with which I agree, I find under the title "Recognisance" the following definition: "Recognisance is a bond of record testifying the recognisor to owe a certain sum of money to some other." The recognisance is in fact a bond in which the appellant acknowledges that he owes a certain sum to the Queen defeasible only under certain conditions—one of which conditions is that he pays the costs of the appeal. Now, the appellant here has not paid the costs of his unsuccessful appeal, and to avoid doing so contends that he entered into the recognisance too late. He

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Costs—
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Liability of
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took his chance of his appeal succeeding, and failed. In my opinion the justices were right, and the rule must be discharged.

GRANTHAM, J.—I am of the same opinion, and do not desire to add anything.

Solicitors for the appellant, *Riddell and Co.*, for *J. H. Jones*, Cardiff.

Solicitors for the justices, *Andrew Mellor and Smith*, for *J. L. Wheatley*, Cardiff.

QUEEN'S BENCH DIVISION.

Thursday, May 8.

(Before Lord COLERIDGE, C.J. and MATHEW, J.)

DIXON (app.) v. WELLS (resp.) (a)

Jurisdiction of justices—Illegal issue of summons—Appearance by accused—Objection to jurisdiction—Waiver of illegality—Conviction—Limit of time—Jervis's Acts (11 & 12 Vict. c. 43), s. 1—Sale of Food and Drugs Acts, 1875 and 1879 (38 & 39 Vict. c. 63, ss. 6, 20; 42 & 43 Vict. c. 30, s. 10).

An information having been laid before two justices against the appellant under the Sale of Food and Drugs Acts, 1875 and 1879, with reference to the sale of a quantity of new milk on the 20th day of September, no summons was issued by such justices, but subsequently a summons returnable upon the 23rd day of October was issued by a justice who had not heard the information. The appellant appeared and objected that the justices had no jurisdiction, as the summons had been illegally issued, but the objection was overruled, upon the ground that, as the appellant had appeared, it was immaterial that the summons had not been properly issued.

Held, that the summons was not legally issued, and that the appearance of the appellant before the justices did not give them jurisdiction, as the Sale of Food and Drugs Act, 1879 (42 & 43 Vict. c. 30), s. 10, requires that the summons shall be served within twenty-eight days from the time of the purchase of the article in question, and the appellant had not appeared until

(a) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

more than twenty-eight days had expired since the alleged offence had been committed.

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THIS was a case stated for the opinion of the court pursuant to 42 & 43 Vict. c. 49, s. 33, and 20 & 21 Vict. c. 43, and was in the following terms: This was a complaint preferred by the respondent, who is the inspector for the borough of Kingston-upon-Hull, under the Sale of Food and Drugs Act, against the appellant, who is a farmer at Benningholme, in the county of York, before me, the undersigned, Edwin Curtis, stipendiary police magistrate for the said borough, for that he, the said appellant, did, on the 20th day of September, 1889, at the said borough, unlawfully sell or deliver to the prejudice of the purchaser a certain article of food, to wit, a quantity of new milk, which was procured by the respondent at the place of delivery in the course of delivery to the purchaser, and consigned in pursuance of a contract for sale to such purchaser, and which quantity of milk was not of the nature, substance, and quality of the article demanded by such purchaser, contrary to the provisions of 38 & 39 Vict. c. 63, s. 6, and 42 & 43 Vict. c. 30, s. 3.

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Appearance of accused—
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Waiver of illegality—
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The circumstances under which an application for a case to be stated arose were as follows:

1. On the day fixed for the hearing of the said complaint the appellant duly appeared before me, sitting as a court of summary jurisdiction at the said borough, in answer to the summons, and was represented by his solicitor.

2. The said summons was as a fact signed by Edward Robson, Esq., one of Her Majesty's justices of the peace for the said borough, and bore date the 14th day of October, 1889, and showed upon the face of it that complaint had been laid before the said justice personally on the date named.

3. The solicitor for the respondent having opened the facts of the case, it was objected, on behalf of the appellant, that the summons was invalid, and that the court in consequence had no jurisdiction to hear and determine the matter.

4. It was admitted on behalf of the respondent that no complaint had been laid before the aforesaid justice on the day named or any day, but, on the contrary, it was admitted that the complaint had been laid before James Stuart, Esq., and T. W. Palmer, Esq., two of Her Majesty's justices of the peace for the said borough, when sitting as a court of summary jurisdiction at the said borough on the 10th day of October, 1889, and that it was by them then granted, but not signed.

5. It was contended on behalf of the appellant, that, inasmuch as it was admitted that no complaint had been laid before the aforesaid Edward Robson, Esq., the summons was bad, and that the court in consequence had no jurisdiction to hear and determine the complaint.

6. It was admitted that the alleged irregularity or defect in

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the said summons was unknown to the appellant prior to his appearance in court.

7. I reserved the points of law raised on behalf of the appellant for future consideration, and proceeded to hear the evidence on the said complaint.

8. The facts produced in evidence were practically undisputed.

9. Having duly considered the points reserved, I was of opinion, even assuming there had been an irregularity or defect in the issuing of the summons, that the same was cured by the appellant's presence in court, and by the absence of any proof or allegation that he had been misled, or of any request for adjournment, and I was of opinion, therefore, that I had jurisdiction to hear and determine the said complaint, and on the 7th day of January, 1890, I convicted the said appellant and fined him in the sum of 5*l.*, and ordered him to pay the costs. The questions for the opinion of the court upon the facts stated are:

(1.) Whether there was an irregularity in the issue of the summons.

(2.) If there was, whether the same was cured by the appearance of the appellant in court on the day of hearing under the circumstances stated.

(3.) Whether I had jurisdiction to hear and determine the matter.

If the opinion of the court with respect to the last question should be in the affirmative, then the said conviction is to stand affirmed, but if otherwise to be quashed.

EDWIN CURTIS.

Jervis's Act (11 & 12 Vict. c. 43) provides:

Sect. 1. That in all cases where an information shall be laid before one or more of Her Majesty's justices of the peace for any county, riding, division, liberty, city, borough, or place within England or Wales, that any person has committed or is suspected to have committed any offence or act within the jurisdiction of such justice or justices for which he is liable by law, upon a summary conviction for the same before a justice or justices of the peace, to be imprisoned or fined, or otherwise punished, and also in all cases where a complaint shall be made to any such justice or justices upon which he or they have or shall have authority by law to make any order for the payment of money or otherwise, then in every such case it shall be lawful for such justice or justices of the peace to issue his or their summons directed to such person, stating shortly the matter of such information or complaint, and requiring him to appear at a certain time and place before the same justice or justices, or before such other justice or justices of the same place as shall then be there, to answer to the said information or complaint, and to be further dealt with according to law.

The Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), enacts:

Sect. 6. No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds.

Sect. 20. Every penalty imposed by this Act shall be recovered in England in the manner prescribed by the 11 & 12 Vict. c. 43.

The Sale of Food and Drugs Act Amendment Act, 1879, (42 & 43 Vict. c. 30), provides:

Sect. 10. In all prosecutions under the principal Act, and notwithstanding the

provisions of section twenty of the said Act, the summons to appear before the magistrate shall be served upon the person charged with violating the provisions of the said Act within a reasonable time, and in case of a perishable article not exceeding twenty-eight days from the time of the purchase from such person for test purposes of the food or drug, for the sale of which in contravention of the terms of the principal Act the seller is rendered liable to prosecution, and particulars of the offence or offences against the said Act of which the seller is accused, and also the name of the prosecutor, shall be stated on the summons, and the summons shall not be made returnable in a less time than seven days from the day it is served upon the person summoned.

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Montague Lush for the appellant.—The summons, having been issued by a justice who did not hear the information, is bad, and the question raised here is whether the appellant by appearing before the stipendiary magistrate waived that objection. When the appellant appeared, the objection was taken on his behalf that the summons was illegally issued.

Kemp for the respondent.—Although a summons or warrant upon which a person is brought before justices may be illegal, the justices have jurisdiction to hear the charge: (*Reg. v. Hughes*, 40 L. T. Rep. N. S. 685; 4 Q. B. Div. 614; *Reg. v. Shaw*, 12 L. T. Rep. N. S. 470; 34 L. J. 169, M. C.; *Blake v. Beech*, 34 L. T. Rep. N. S. 764; 1 Ex. Div. 320; *Reg. v. Thomas, Fletcher*, 51 L. T. Rep. N. S. 334; L. Rep. 1 C. C. R. 320. [MATHEW. J.—If a person is brought before justices, can they try him upon any charge they like, whether he is prepared to meet it or not?] If the prisoner was not prepared with his defence, the justices would probably adjourn the case.

Lush in reply.—The principle underlying the decision in *Reg. v. Hughes (ubi sup.)* is that if a person is before justices, no matter how he got there, and does not raise any objection to their jurisdiction, but takes his chance of obtaining a favourable decision, he cannot, if he is convicted, subsequently raise the objection. The summons is bad in this case, and therefore the appellant must be treated as if he were summoned on the day on which he appeared before the stipendiary magistrate, which would be more than twenty-eight days after the alleged offence was committed. But it is provided by the Sale of Food and Drugs Act, 1879 (42 & 43 Vict. c. 30), s. 10, that the summons must be served upon the person charged within twenty-eight days; therefore the charge was made too late.

LORD COLERIDGE, C.J.—This case has been argued at considerable length, but I do not in any sense regret the time which has been occupied, for it is a case of considerable importance. The facts of the case are simple enough in themselves. The appellant was convicted before the stipendiary magistrate at Hull for having sold a quantity of new milk which was not of the nature, substance, and quality demanded by the purchaser, contrary to the provisions of 38 & 39 Vict. c. 63, s. 6, and 42 & 43 Vict. c. 30, s. 3. An information was laid against the appellant before two justices, but those justices did not issue a summons; the offence was alleged in that information to have been committed upon the 20th day of September. What purported to be a summons

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was subsequently signed and issued by another justice, who had not heard the information, and that summons stated that the case was to be heard upon the 23rd day of October. The objection is taken that this was no summons at all, because the justice who issued the summons did not hear the information, and the justices who heard the information did not issue the summons. We are told that a practice has grown up by which a clerk to justices hears a complaint, draws out a summons, and then, without any written information, takes the summons to any justice whom he can find for signature. Whether there is any *prima facie* case or not the justice is perfectly ignorant, and I must say that I cannot imagine any practice which is more likely to lead to injustice to persons than such as has been described to us in this case. If the justice who issued the summons in this case had heard all the facts he might never have signed the summons at all. I cannot regard this document as a summons at all, and it seems to me to be issued in direct defiance of the provisions of Jervis's Act (11 & 12 Vict. c. 43), s. 1, which says that "in all cases where a complaint shall be made to any such justice or justices upon which he or they have or shall have authority by law to make an order for the payment of money or otherwise, then and in every such case it shall be lawful for such justice or justices to issue his or their summons." If I were at liberty to lay down the law I should say that the above provision of Jervis's Act was to be strictly obeyed, and that if persons purporting to act under it disobeyed that provision, such person would be acting without jurisdiction. But that view is not the law, because so far back as the year 1865 Erle, C.J. in *Reg. v. Shaw* (12 L. T. Rep. N. S. 470; 34 L. J. 169, M. C.) laid down the law to be that if a man was brought before the justices without any summons or information they could convict him, and he said: "In my opinion, if a party is before a magistrate, and he is then charged with the commission of an offence within the jurisdiction of that magistrate, the latter has jurisdiction to proceed with that charge without any information or summons having been previously issued, unless the statute creating the offence imposes the necessity of taking some such steps." That case does not stand alone, for it was decided in *Reg. v. Hughes* (40 L. T. Rep. N. S. 685; 4 Q. B. Div. 614) by a court consisting of ten judges, of whom only one, the late Lord Chief Baron, dissented, after the case had been twice argued, that, although there was neither written information nor oath to justify the issue of the warrant upon which the accused was arrested, the justices had jurisdiction to hear the charge, though the warrant upon which the accused was brought before them was illegal. Those cases establish that when a person is once before justices who have jurisdiction to try the case, the justices need not inquire how he got there, but may try him. It is immaterial whether he comes there in obedience to a summons or whether there is no summons, whether there is an information or not, or whether he is brought there by force or by

fraud. It is idle for us to struggle against the law if that is the law. But I do not think that this case comes exactly within those cases. In the two cases I have referred to there was no protest before the justices on the part of the person who subsequently questioned the jurisdiction of the court. Faults of procedure, unless there is some rigid provision to the contrary, may be waived by a person if he pleases; and if he waives them and submits to the jurisdiction of the court it is too late for him afterwards to turn round and question the jurisdiction of the court. That is a very old rule and a very sound rule. But the appellant here took this very objection when he was before the stipendiary magistrate, and he takes it again in this court. He says there was no summons and no information; if he had not raised the objection before the court below it would have been of no avail to him now, but he did protest upon this ground. In that respect this case differs from the other cases to which I have referred. But I do not feel strong enough to decide the case upon that point alone, for, though I think it ought to be a complete answer to the charge, I cannot disguise from myself that from the very language of the several judges, and from what underlies their judgments in *Reg. v. Shaw* (12 L. T. Rep. N. S. 470; 34 L. J. 169, M. C.) they assumed that a mere protest from the person accused would not be sufficient. I should be glad to think that the law was otherwise. But there is another point in the argument upon which Mr. Kemp has not satisfied me that he is right. Sect. 10 of the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30) is in these terms: "In all prosecutions under the principal Act, and notwithstanding the provisions of sect. 20 of the said Act, the summons to appear before the magistrates shall be served upon the person charged with violating the provisions of the said Act within a reasonable time, and in case of a perishable article not exceeding twenty-eight days from the time of the purchase from such person for test purposes of the food or drug, for the sale of which in contravention of the terms of the principal Act the seller is rendered liable to prosecution, and particulars of the offence or offences against the said Act of which the seller is accused, and also the name of the prosecutor shall be stated on the summons, and the summons shall not be made returnable in a less time than seven days from the day it is served upon the person summoned." So that this section enacts as a condition precedent to the trial of a person for an offence under the Act the summons must be served within a reasonable time in any case; and if the article is perishable, as it was in the present case, the summons must be served within twenty-eight days; and it concludes by saying that the summons shall not be returnable in a less time than seven days. It therefore carefully secures for the person accused with reference to a perishable article that the charge shall be brought within twenty-eight days, and that he shall have seven days in which to prepare his defence. Time in this Act cannot be disregarded, and is of

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the essence of the jurisdiction to try the offence. This applies to every case under the Act, for the section commences in the strongest language by saying "In all prosecutions." Except by extending the doctrine laid down in *Reg. v. Hughes* (40 L. T. Rep. N. S. 685 ; 4 Q. B. Div. 614) to this section, I fail to see how it can be said that there was jurisdiction to try the appellant, and if that doctrine were so extended I think it would be violating the very words of the section. I am therefore of opinion that the appellant could not be tried, for as a condition precedent he must be brought within the protection of the section. In this case, as I have already said, there was no legal summons, but the man appeared before the justices upon the day upon which the document which purported to be a summons was made returnable, and the justices then proceeded to try him for an alleged offence which it was admitted by the prosecution had been committed more than twenty-eight days previously. It seems to me that sect. 10, which I have quoted above, applies in this case, and that it is essential that the jurisdiction thereby given must be exercised within twenty-eight days. The conviction in this case must therefore be quashed.

MATHEW, J.—I am of the same opinion. There was really no summons in this case. The magistrate who issues a summons must be satisfied before doing so that there is a *prima facie* case against the person to whom the summons is addressed. The document in this case which purports to be a summons is utterly worthless as such, but the appellant having appeared the magistrate proceeds to try him. The appellant was then entitled to say that the jurisdiction of the magistrate was limited by sect. 10 of the Act under which he was charged. I agree with the contention of the appellant, that the jurisdiction was so limited, and that the conviction in this case was wrong.

Conviction quashed.

Solicitors for the appellant, *Bell, Brodrick and Gray*, for *J. T. and H. Woodhouse*, Hull.

Solicitors for the respondent, *Ounliffes and Davenport*, for *Dawe*, Town Clerk, Hull.

QUEEN'S BENCH DIVISION.

Thursday, December 5th, 1889.

(Before Lord COLERIDGE, C.J. and MATHEW, J.)

STARCY v. THE CHILWORTH GUNPOWDER MANUFACTURING COMPANY. (a)

Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 2, sub-sects. (1) and (2), sect. 3, sub-sect. (1, b)—False trade description—"Intent to defraud"—Jurisdiction of magistrates.

A gunpowder manufacturing company had contracted with Her Majesty's Government to supply 5000 barrels of a certain class of powder known in the trade as R. L. G. 4. There were no stipulations in the contract that the gunpowder should be of the company's own manufacture, or that it should be of English manufacture. The company being unable, through no fault of their own, to fulfil their contract imported gunpowder from Germany. This gunpowder—which was equal in quality to, and accurately described as, R. L. G. 4—was, on its receipt by the company, taken out of the cylinders in which it was imported and which were labelled "manufactured in Germany," and was placed and supplied to the Government in barrels to each of which was affixed the following label, "Gunpowder, 110lb. Chilworth Gunpowder Company Limited, R.L.G. 4;" which was the label prescribed by the Government. On a prosecution being instituted, under the Merchandise Marks Acts, 1887, against the company on the above facts, the magistrates found that the label was not a "false trade description" within the meaning of the statute, and that there had been no "intent to defraud," and they accordingly dismissed the case.

Held, on appeal, that the label was a "false trade description" within the meaning of sect. 2 of the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28) and that there had been an "intent to defraud," in the sense of an intention to mislead the purchaser, and that, therefore, the magistrates ought to have convicted.

THIS was a case stated by magistrates on the application of the appellant, who was dissatisfied with their determination as being erroneous in point of law.

From the case it appeared that, on the 4th day of April, 1889, an information was laid by John Starcy, the appellant, against the Chilworth Gunpowder Company Limited, charging them that they, on the 7th and 11th days of February, 1889, and on

(a) Reported by R. M. MINTON-SENHOUSE, Esq., Barrister-at-Law.

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other days, at Purfleet, in the parish of West Thurrock, in the county of Essex, did unlawfully apply or cause to be applied a false trade description, to wit, the letters, figures, and words, "Gunpowder, Chilworth Gunpowder Company Limited, R. L. G. 4," to goods—viz., gunpowder—contrary to the statute 50 & 51 Vict. c. 28, s. 2.

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tion"—
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(2), 3 (1, b).*

Sub-sect. (1) of sect. 2 of the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), provides that every person who (amongst other things) applies or causes to be applied any false trade description to goods shall, subject to the provisions of that Act, and unless he proves that he acted without intent to defraud, be guilty of an offence against that Act. By sub-sect. (2) of sect. 2, every person who sells or exposes for, or has in his possession for, sale or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied, or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves (*inter alia*) that he acted innocently, be guilty of an offence against the Act. By sub-sect. (1) of sect. (3) trade description means any description, statement, or other indication, direct or indirect (*inter alia*) as to the place or country in which any goods were made or produced.

At the hearing the following facts were proved, and were set out in the case stated :—

The respondents were an English company, limited by shares and registered under the Joint Stock Companies Acts, 1862 to 1886. They were manufacturers of gunpowder, and had mills at Chilworth in the county of Surrey and at Fermilee in the county of Derby, and they had general offices in the city of London. In the month of May, 1888, the respondents entered into a contract with Her Majesty's Government for the supply of 5000 barrels of gunpowder, of a description known as R. L. G. 4 (Rifle Large Grain, No. 4). The said contract contained stipulations that the said gunpowder should be delivered on certain specified dates, and that in default of delivery on such dates, the respondents should be liable to a fixed penalty of 2½ per cent., and to be charged with the difference in price if Her Majesty's Government should buy in the said gunpowder elsewhere. There were no stipulations in the said contract that the said gunpowder should be of the respondents' own manufacture, or that it should be of English manufacture, and it was proved that in other contracts between the respondents and Her Majesty's Government such express stipulations were inserted.

The respondents were manufacturers of the kind of gunpowder mentioned in the contract, and at the time of making such contracts they intended to manufacture the gunpowder which they had agreed to supply. They were prevented, however, from carrying out such intention by two explosions which took place at their mills on the 5th day of June and the 31st day of August,

1888, whereby the said mills were for the time being rendered useless for the manufacture of gunpowder.

Her Majesty's Government pressed for the delivery of the said gunpowder, and, in order to fulfil their contract, the respondents made arrangements with a German firm, and imported the whole of the said gunpowder from Germany in cylinders which bore labels marked "manufactured in Germany." By reason of their having to import the said gunpowder for the purposes of the said contract the respondents sustained a loss of 3s. or 4s. a barrel.

Upon receiving the said gunpowder at their mills at Chilworth the respondents took it out of the cylinders and placed it in the barrels supplied to them by Her Majesty's Government, according to a provision in the said contract that the said gunpowder should be delivered in barrels supplied by the Government for that purpose. The respondents affixed or applied to each of such barrels the following: "Gunpowder 110lb., Chilworth Gunpowder Company Limited, R. L. G. 4."

This label is in the form which the Government prescribed for their barrels containing powder; the words "Chilworth Gunpowder Company Limited" being inserted in the place where the name of the contractor is required to be inserted. There was no indication upon the said label or otherwise on the said barrels that the said gunpowder was of German manufacture. but the description of the said gunpowder was accurately stated as R. L. G. 4, and it was equal in quality to powder of that description manufactured by the respondents. The said gunpowder was accepted by the Government in fulfilment of the contract without complaint that it was inferior in quality, or that it did not answer the description of the gunpowder contracted for, but it was admitted that no communication was made to the Government, upon delivery or otherwise, that the said gunpowder was of German manufacture.

On these facts the magistrates found that the said label was not a false trade description within the meaning of the statute, and that there had been no intent to defraud on the part of the respondents. They therefore dismissed the case. The question for the opinion of this court was, whether upon the above facts the magistrates ought to have convicted the respondents.

Maidlow (M'Kenna with him) for the appellants.—This case is within the Merchandise Marks Act, 1887, for it is a case of false description as to the place or country in which this gunpowder was made or produced: [50 & 51 Vict. c. 28, s. 3, sub-sect. (1, b)] The respondents professed to be manufacturers of, and not merely dealers in, gunpowder. They put the German powder in barrels marked with their own label, which described it as manufactured by themselves. The German label, describing it as manufactured in Germany, was a trade mark within the meaning of the Act, and the label put on by the respondents was a false mark. As to the "intent to defraud," the whole scope of the Act shows that the offence is committed if the parties knew that

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a false impression would be conveyed to the customer by the description.

Poland, Q.C. (R. S. Wright with him) for the respondents.—The magistrates were right in refusing to convict. The company had intended to manufacture this gunpowder themselves and were prevented by the explosions which had taken place. The Government required that the gunpowder should be delivered in barrels supplied by them, and all that the company had done was to affix their own mark to those barrels. The magistrates have found in our favour that this was not a false trade description within the meaning of the Act. The magistrates have found that the label of the contractor was to be put on the barrels; and here the word "contractor" is synonymous with "vendor." Then the magistrates have found further that there was no intent to defraud. There was no stipulation in the contract that the powder should be of their own manufacture; that is material as to the intent to defraud. Besides that, the respondents did not seek any pecuniary benefit or seek to palm off an inferior article. This is a Penal Act, and the existence of *mens rea* is essential to constitute the offence: (*Gridley v. Swinborne*, 52 J. P. 791.)

Lord COLERIDGE, C.J.—In this case, which is one of considerable importance, a large firm of gunpowder manufacturers had contracted with the Government, which approved of their powder, to deliver to them a quantity of gunpowder known as R. L. G. 4. The manufacturers unfortunately had an explosion at one of their factories which prevented them from fulfilling their contract. They were, however, tied down to deliver the powder by a certain date under certain penalties, and it is admitted that at the time they would have had very great difficulty in obtaining in this country powder of the kind required, in sufficient quantities. Accordingly, they had recourse to a large German firm of manufacturers, and obtained from them a large quantity of powder which was just as good in quality as their own. This powder they put in barrels and delivered to the Government, and it is upon the labels attached to these barrels that an important question in this case arises. The labels had upon them these words: "Gunpowder, 110lb., The Chilworth Gunpowder Company, R. L. G. 4." That was a label as to which the magistrates have found that, "it is in the form prescribed by the Government for all barrels containing powder, and the words 'Chilworth Gunpowder Company' were inserted in the place where the name of the contractor is required to be inserted." Now the word "contractor" may mean one of three things: either a manufacturer who is not otherwise a vendor; or a vendor who is not a manufacturer; or a person who is both vendor and manufacturer; and therefore, where it is important to ascertain whether the parties were only manufacturers or what, the word "contractor" is obscure and ambiguous. If, therefore, there had not been in the case itself the means of

deciding on the sense in which the term is used, we could have remitted the case to the magistrates. The case does, however, supply the means of deciding this. The Chilworth Gunpowder Company are manufacturers, and in a sense manufacturers only. It is indeed said that in this case they were vendors; but it is admitted that, except in this instance, they never sold any gunpowder which they had not themselves manufactured. Therefore, when they used this label, the respondents meant to convey to their customers that they were the manufacturers of the powder contained in the barrels so labelled. But they were not the manufacturers of that powder, and it is clear to me therefore that they were using a false trade description within the meaning of the Act. This conclusion is strengthened by reference to the case of *Johnson v. Raylton* (45 L. T. Rep. N. S. 374; 7 Q. B. Div. 438), in which it was held that where a person buys goods from a person who is a manufacturer, but who is not otherwise a dealer in them, there is an implied warranty that the manufacturer supplies goods of his own manufacture. That case has been acquiesced in, and is therefore good law, and is a strong authority in confirmation of the view I take. We come therefore to the conclusion that the magistrates were wrong in holding that there was no offence against the Act. But, although on this point there has been an offence against the Act, that does not conclude the case, because, both in the 1st and 2nd sub-sections of 50 & 51 Vict. c. 28, s. 2, it is a defence if the accused can prove that he has acted in the one case without "intent to defraud" and in the other case "innocently." It is not necessary to go elaborately into the provisions of the above sub-sections; they are pointed at different offences, and therefore the language naturally varies, though in substance the language is the same. But we have to decide the sense in which the words "intent to defraud" are used in this Act, and it is obvious that in arguing about the meaning of a phrase one ought to begin by defining it. Now, I entirely agree that, in the sense of intending to put off upon him something less valuable than the purchaser agreed to take, there was here no intent to defraud in any money sense of the word. That, however, does not conclude the case here. What is pointed at by this Act is the wrongful use of trade marks or descriptions, and the putting off upon a purchaser an article which is not perhaps worth less money, but which the purchaser is less inclined, and which he has not stipulated, to buy. It may be that there is not much difference between A.'s fish sauce and B.'s, but if A. uses B.'s mark he thereby gets orders which he otherwise would not get; and if he does so there is an intention to mislead purchasers into buying an article which they had no intention of buying. It is in some such sense as this that the word "defraud" is used in this Act, and in that sense, and in that sense alone, I think there was an intention to defraud in the present case. It is clear that the respondents wished to save their contract and to escape the penalties which

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tion"—
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c. 28, s. 2 (1)
(2), 3 (1, b).*

their failure to fulfil it would have entailed upon them. With this object, and in order to deliver the powder in time, they went to a German manufacturer, they changed the barrels in which the stuff came over, and they inserted the label which in my judgment is a false trade description. It is said that the magistrates have found that there was no intention to defraud; but they have so stated the case as to leave to us the question whether on the facts they ought to have convicted the respondent, and therefore they cannot have intended that their finding should be taken as negating any intent to defraud in any sense, or the leaving of the case to us would have been absurd. I come, therefore, to the conclusion that they were wrong in not convicting the defendants, and the case must be remitted to them to deal with accordingly.

MATHEW, J.—I am of the same opinion. One of the evils intended to be struck at by this Act is the doing of what has been done in this case, viz., misstating or concealing the place of manufacture. That is an offence created by the Act; that is the offence of which the respondents are guilty. Considering the acts of the respondents in changing the barrels and in affixing the labels, it is impossible to avoid the conclusion that they intended to convey the impression that the powder was of their own manufacture. As to the expression "intent to defraud," I do not believe that there was any such intent in the sense of attempting to palm off inferior goods upon the Government. But there was an obvious attempt to escape the consequences of failing to perform their contract. The words "intent to defraud" are not to be construed as meaning with intent to cheat. The offence created by the Act is the using of a false trade description, and it is not the less committed because there is no intent to defraud in that sense. In my opinion the magistrates ought to have convicted.

Solicitors for the appellants, *McKenna and Co.*

Solicitors for the respondents, *Bircham and Co.*

QUEEN'S BENCH DIVISION.

Wednesday, Dec. 11, 1889.

(Before Lord COLERIDGE, C.J. and MATHEW, J.)

REG. v. THE JUSTICES OF BROMLEY. (a)

Weights and measures—Post-office—Postmaster carrying on other trade requiring weights and scales—Post-office scale unjust—Right of inspector to seize—Jurisdiction of justices—Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), ss. 25, 59.

A postmaster, who also carried on the business of a bakery, was summoned, under sect. 25 of the Weights and Measures Act, 1878, for having in his possession for use for trade an unjust scale; this scale was supplied by, and was the property of, the Postmaster General, and was on the same counter as that on which the bread was sold. There were in the shop no weights or scales suitable for the weighing of bread except the Post-office weights and scales, though by statute it was necessary to sell the bread by weight, and to have weights for that purpose. There was no suggestion that the postmaster knew that the scale was unjust, or that he had used it for the purposes of his trade.

Held (making absolute a rule for a prohibition) that Post-office weights and measures, supplied by the Post-office for post-office purposes, are not within the operation of the Weights and Measures Act, 1878, and that consequently the justices had no jurisdiction to enter on the inquiry.

RULE nisi, calling on the justices of Bromley and the inspector of weights and measures for the district of Bromley, to show cause why a writ of prohibition should not issue, to prohibit the justices from hearing and determining an information against Alfred Nicholls charging him, under sect. 25 of the Weights and Measures Act, 1878, with having a false and unjust scale for use in his trade.

Mr. Nicholls was the master of the post-office at Down, Beckenham, Kent, and he also carried on, in the same shop as the post-office, the business of a bakery, and by the Act 6 & 7 Will. 4, c. 37, he was bound to sell his bread by weight, and by sect. 6 of that Act he was also bound to have in his shop proper scales and weights for the weighing of the bread, under a penalty not exceeding five pounds. As postmaster he had in his possession scales and weights supplied by the Postmaster-General,

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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which were used for the weighing of parcels for the parcels post. These Post-office weights and scales were subject to Government inspection, and they had been so inspected and checked by the Post-office surveyor of the district. An inspector of weights and measures for the district went into Mr. Nicholls' shop, and inspected the weights and scales used by Mr. Nicholls in the way of his business, and found them to be correct. These were small weights and scales used for weighing small things, but not suitable for weighing bread, and they were Mr. Nicholls' own property. Except these small weights and scales, the inspector saw no other weights or scales which would have been suitable for weighing bread except the Post-office weights and scales, which were lying on the same counter as that on which the bread was sold. The inspector was informed that these were Post-office weights and scales, and that they were never used for the purposes of the trade, but he proceeded to test them, and he found the scales to be incorrect and false by about a quarter of an ounce, and he seized and removed the scales.

A summons was then taken out, under the above section, against Mr. Nicholls for having in his possession scales and weights "false" within the statute. The summons had been issued by the justices, but the hearing was adjourned, and Mr. Nicholls and his wife made affidavits to the effect that the weights and scales in question were never used by them for the purposes of their business, but were only used by them for Post-office business in the weighing of parcels. The scale so seized was supplied by the Post-office, and was the property of the Crown, and there was no suggestion that Mr. Nicholls knew that it was unjust, or that he had used it in his business.

A rule for a prohibition was obtained to prohibit the justices from proceeding with the information, on the ground that the weights and scales supplied by the Postmaster-General were the property of the Crown, and did not come within the statute.

Sect. 25 of the Weights and Measures Act, 1878, provides :

Every person who uses, or has in his possession for use for trade, any weight, measure, scale, balance, steelyard, or weighing machine which is false and unjust, shall be liable to a fine not exceeding five pounds. . . . and the weight, &c., shall be liable to be forfeited,

Sect. 59 provides :

Where any weights, measures, scale, balance, steelyard or weighing machine is found in the possession of any person carrying on trade within the meaning of this Act, or on the premises of any person which . . . are used for trade within the meaning of this Act, such person shall be deemed for the purposes of this Act, until the contrary is proved, to have such weights, &c., in his possession for use for trade.

Poland, Q.C. and *R. S. Wright* for the County Council of Kent, showed cause.—This court will not grant a prohibition when the subject-matter is within the jurisdiction of the justices. [*The Attorney-General.*—I admit that the prohibition ought not to go, if on the affidavits it was found that these scales were used in

the way of business; here they were found to be Post-office weights and scales. **MATHEW, J.**—The Act contemplates the confiscation of the scales which are the property of the man who uses them; here you admit that they cannot be confiscated.] Whether these scales were used for the purposes of the trade or not, is a question of fact to be dealt with by the justices. [**LORD COLERIDGE, C.J.**—Is the Crown to have its own property taken away by its own magistrates?] The authorities are clear that prohibition will not go if the matter to be inquired into is within the jurisdiction of the justices. Here they have jurisdiction over the subject-matter; that is to say, they have jurisdiction to inquire whether this man used these Post-office weights or scales in the course of his trade. This offence is laid under sect. 25 of the Act, and it is one which the justices have jurisdiction to hear and determine, and therefore it is a case in which there ought not to be a prohibition. Though the justices may have no power to order the scales to be forfeited, that is no reason for the prohibition, if they have jurisdiction to enter on the inquiry. It is not contended by the County Council that they have a right to seize the Post-office weights or scales; but if such weights or scales are used in a person's business in his shop, the justices have jurisdiction to inquire into the matter. [**LORD COLERIDGE, C.J.**—According to your view sect. 59 puts on every postmaster in the kingdom the onus of showing that he was not using Post-office weights for the purposes of his business.] Not necessarily. On the question of prohibition sect. 59 is not material; sect. 25 is the important section, and the sole question is under that section. There is a question here, and the County Council have a right to go before the justices and have that question inquired into. If the justices go wrong, they can be set right by prohibition, *certiorari*, or *mandamus*, and there is no instance of a case of this kind being determined on prohibition: (*Reg. v. Herford*, 2 L. T. Rep. N. S. 459; 29 L. J. 249, Q. B.) A prohibition does not lie where the matter is within the jurisdiction of the court: (*Re Appledore Tithe Commutation*, 8 Q. B. 139.)

The *Attorney-General* and *Casserley*, for the Crown in support of the rule.—Post-office weights are not within the Act at all. On the face of the affidavits, it appears that the inspector went into this post-office and seized these weights. He adopted the wrong remedy, as, under 6 & 7 Will. 4, c. 37, the postmaster could have been summoned and would have been liable to a penalty for not having proper weights on his counter for weighing bread. There was no evidence that the Post-office weights or scales were used by the postmaster for his business; on the contrary, on the three occasions on which the inspector visited the shop he was distinctly told that these weights were never used for the purposes of the trade. This Act was not intended to and does not apply to any weights or scales belonging to the Postmaster-General. The section says that they must be in the possession of the person for the use of trade, which was not the case here,

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and that shows that the section only applies to weights and scales which can be forfeited, as we see by the words "and may seize and retain the same." It would require express words in a statute to enable an inspector to seize Crown property. It ought to be added that in our affidavits we have negatived any idea of an improper use of the scales.

LORD COLERIDGE, C.J.—I am of opinion that this prohibition must go. I entirely admit that, although magistrates cannot give themselves jurisdiction by finding a fact wrongly, yet, nevertheless, if the subject-matter is one upon which they have jurisdiction, there is nothing to prevent their entering upon it, and they may, as it seems, by a finding contrary to the fact, thereby proceed to hear the case. That is inherent in the law, though I do not pretend to understand it. I know perfectly well that, if there is jurisdiction to enter upon the inquiry, it is not because they may decide wrongly that they are to be prohibited from entering upon it. The principle is too well established and too firmly rooted in the jurisprudence of the courts for anybody now to attempt to shake it. But it is, and must be, necessarily a condition precedent to the entering upon the inquiry, that the inquiry itself is within the scope of the magistrates' jurisdiction, and, if it is not within their jurisdiction, then the prohibition will go. Now, in this case an information was laid before the magistrates, under the Weights and Measures Act, 1878, and the only material sections to consider in this Act are the 25th and the 59th. I need not read the sections again; it is enough to say that this Act is directed broadly against the use of unjust weights and measures, and that with regard to the use of unjust weights and measures very strong and very sweeping terms are employed. "Every person who uses or has in his possession scales and weights which are unjust"—that is the 25th section—that is to be followed by certain penalties. Under the 59th section, "where any weight, measure," and so forth, "is found in the possession of any person carrying on trade," then certain results follow. As I pointed out during the argument, so I say now in the judgment, one cannot look at the 25th section without looking at the 59th. They are both directed to the same point, they are both portions of a code—a very proper code—upon the subject, and the 25th section cannot be taken and dealt with by itself, but for the purpose of seeing what is within the whole Act both sections must equally be looked at. This being the general purpose of the Act, and the stringent provisions of the Act being what I have pointed out, then comes the question whether it was ever intended by Parliament that weights and scales supplied by any Government department—in this case by the Post-office—seen and certified and kept correct from time to time by Government inspection, should be within the contemplation of the Act, and should be within the jurisdiction of the inspector of weights and measures, either created under or recognised under the Act. I am clearly of opinion that it was not so intended. The conse-

quences of holding the contrary have been very forcibly pointed out in the arguments. It is to be observed that this is an information under sect. 25 for having in his possession unjust scales. In the other section (sect. 59) if a person has in his possession false and unjust scales he shall be deemed to have them for the purpose of trade until the contrary is proved. It is enough to say that in this case the defendant is not charged with any fraudulent use of the scales; such, as has been suggested, might by possibility, if that were the case, be a matter for the justices to inquire into, although I do not think it would be. That question, however, is not before us. The question is, whether they have jurisdiction to enter upon this inquiry, whether, when a postmaster has weights and scales supplied to him by the Post-office for Post-office purposes, the having them in his possession can by possibility give jurisdiction to the justices to inquire into the falsity or otherwise of such scales so in his possession, and so supplied to him by the Post-office. I think clearly not. I think it never could have been intended for an instant, with regard to Government officials, having and being obliged to have in their possession weights and scales supplied by the Government for public purposes in the matter of revenue, that the magistrates should enter into an inquiry as to that possession so undoubtedly legal and so necessary for the conduct of the business of a public department, or that the having such articles in his possession should be made the subject-matter of inquiry by two justices in petty sessions on the complaint of an inspector of weights and measures. Such a proceeding is not within the meaning of the Act. The postmaster has, and can have, these things in his possession only from the Post-office, and it is admitted that they were supplied by Government authority. This seems to me to be an attempt on the part of the inspector to assert a jurisdiction for which there is no pretence, and which might be used oppressively. Because, as was pointed out in the argument, in answer to a question by my learned brother, in an information of this kind, in which, if it is within the Act, the presumption is that these weights and scales are used for the purposes of his business, it is supposed to be law and indeed must be—it is the presumption—that a postmaster has Post-office weights and scales for the purposes of his trade until he proves the contrary, and it is admitted that he cannot be examined. To refuse this prohibition would be to bring within the jurisdiction of the magistrates a subject-matter which was never intended, and would be extremely inconvenient to be brought before them, and which, if it could have been so brought, would undoubtedly render a change of the law in that respect necessary.

MATHEW, J.—I am of the same opinion. It seems to me clear and manifest that Parliament never intended to treat the weights and measures supplied by a public department as within the operation of this Act. It is a highly penal statute. It sub-

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stitutes, in the modern fashion, presumption for evidence. The charge in this particular case is the charge of possession. I am not at all pressed with the consideration that the conclusion that Government weights were not contemplated will create a difficulty in the prosecution of a postmaster for the use of those weights, because, when no other weights are used, there are other means by which the public can be adequately protected. We must see what would be the necessary consequences of holding that such weights as these come within the purview of the Act. The first consequence would be, that the perfectly innocent use of the weights would be criminal; the second consequence would be, that the weights might be removed from the post-office, and the business of the post-office be stopped; and the third consequence would be, that justices would have the power to confiscate the property of the Crown. Mr. Poland is compelled to say, it would be preposterous to ask the justices to do anything of the sort. We have to see what weights and measures are intended to be dealt with, and, if that power is conferred upon the justices, it is an indication that other weights and measures than these are those with which the Act was dealing. For these reasons, and the reasons given by my Lord, I think the prohibition should go. The postmaster would have no right, as it appears to me, to interfere with the weights and measures supplied by the Post-office, or to correct any error in them.

Rule absolute for prohibition, with costs.

Solicitor for the Postmaster-General, *The Solicitor to the Post-Office.*

Solicitors for the County Council of Kent, *Latter and Willett, Bromley.*

QUEEN'S BENCH DIVISION.

Wednesday, Feb. 5, 1890.

(Before FREY, L.J. and MATHEW, J.)

REG. v. J. BRIDGE, ESQ. (Metropolitan Police Magistrate.) (a)

Practice—Appeal from Court of Summary Jurisdiction by special case—Refusal of magistrate to state a case—Question of law—Removal of refuse—Ashes—"Trade refuse"—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 125-129—Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33.

(a) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

It is provided by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), that the vestries shall appoint persons to remove all dirt, ashes, &c., within their parish; that if the owner of any premises shall require the scavenger to remove the refuse of any trade, such owner shall pay to the scavenger a reasonable sum for such removal; that the justices shall determine whether the matter is or is not the refuse of trade, and the decision of such justices shall be final.

The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33, enacts that any person aggrieved who desires to question the order of a court of summary jurisdiction, on the ground that it is erroneous in point of law, may apply to the court to state a case, and, if the court decline to state the case, may apply to the High Court of Justice for an order requiring the case to be stated.

The vestry of St. M. refused to remove, unless paid for doing so, the ashes and other refuse produced by furnaces at an hotel within the parish, such furnaces being used for supplying the electric light and other purposes.

The manager of the hotel applied to one of the metropolitan police magistrates, who decided that the ashes were not trade refuse, and that the vestry must remove them without extra payment.

On behalf of the vestry an application was made to the magistrate to state a case for the opinion of the High Court, but he refused to do so upon the grounds (1) that his decision was final and conclusive, and (2) that no point of law arose in the case.

Held, that the decision of the magistrate was not final and conclusive, and that the question whether the ashes were trade refuse or not depended upon the construction and interpretation to be put upon the words of a statute, and was therefore a question of law upon which the magistrate must state a case.

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THIS was an order *nisi* calling upon John Bridge, Esq., one of the magistrates of the police-courts of the metropolis sitting at the Bow-street Police-court and Frederick Gordon, to show cause why the said magistrate should not state and sign a case for the opinion of this court.

It is provided by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), as follows :

Sect. 125. It shall be lawful for every vestry and district board and they are hereby required to appoint and employ a sufficient number of persons, or to contract with any company or persons, for the sweeping and cleansing of the several streets, within their parish or district, and for collecting and removing all dirt, ashes, rubbish, &c., in or under houses and places within their parish or district.

Sect. 128. In case any scavenger is required by the owner or occupier of any house or land to remove the refuse of any trade, manufacture, or business, or of any building materials, such owner or occupier shall pay to the scavenger a reasonable sum for such removal, such sum, in case of dispute, to be settled by two justices.

Sect. 129. If any dispute or difference of opinion arise between the owner or occupier of any such house or land and the scavengers required to remove such refuse as to what shall be considered as refuse, it shall be lawful for any two justices, upon application made to them by either of the parties in difference, to determine whether

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the subject-matter of dispute is or is not refuse of trade, manufacture, or business, or of any building materials, and in every such case the decision of such justices shall be final and conclusive.

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At the Hôtel Métropole, which is situate within the parish of St. Martin's-in-the-Fields, are three furnaces, which are used for supplying steam power for heating the hotel, pumping water, cooking, and working the engines for supplying the electric light. The vestry of St. Martin's refused to remove the ashes and clinkers from these furnaces, upon the ground that they were trade refuse, unless the proprietors of the hotel paid them, under the provisions of sect. 128 above set out, for so doing. The proprietors of the hotel refused to make any payment to the vestry, and upon the 27th day of April, 1889, they took out a summons at the Bow-street Police-court to have the question decided whether the subject of dispute was or was not a refuse of trade or business.

The magistrate decided that the refuse was not a trade refuse within the meaning of the above section, and that the vestry was therefore liable to remove it without extra payment. An application was thereupon made to the magistrate to state a case for the opinion of this court, but he declined to do so upon the grounds (1) that by sect. 129, above set out, his decision in the matter was made final and conclusive, and (2) that no point of law arose in the case.

The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33, enacts that,

Any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the court to state a special case setting forth the facts of the case and the grounds on which the proceeding is questioned, and if the court decline to state the case, may apply to the High Court of Justice for an order requiring the case to be stated.

Orump, Q.C. (with him *J. E. Bankes* and *Courthope Munro*) now showed cause.—No proper application has been made to the magistrate to state a case. By rule 17 of the Summary Jurisdiction Rules, 1880, the application must be made in writing, whereas in this case it was made verbally directly after the magistrate had given his decision. [*MATHEW, J.*—The object of that rule was that the magistrate and parties interested should have proper notice of the application, and in this case it is admitted that it was made in open court when everyone was present. I think that the application was sufficient.] The decision of the magistrate is, by sect. 129 of the Metropolis Management Act, 1855, made final and conclusive, and that provision is not overruled by the Summary Jurisdiction Act, 1879. There was no question of law in dispute; the question whether this refuse was trade refuse was a question of fact for the magistrate. [*Fry, L.J.*—The question is, what construction is to be put upon the words "refuse of trade or business" in the Act; that seems to me to be a question of law.]

R. G. Glenn in support of the rule.—The magistrate has no option under the Summary Jurisdiction Act, 1879, but must state a case on the application of a party aggrieved who desires to question his order on the ground that it is erroneous in point of law. The vestry here say that they are aggrieved by the construction the magistrate has put upon the words of a statute, which, I submit, is a point of law.

Fry, L.J.—The facts in this case are shortly these. Frederick Gordon, the manager of the Hôtel Métropole, which is situate within the parish of St. Martin's-in-the-Fields, laid an information before one of the magistrates at the Bow-street Police Court, in which he complained that the vestry refused to remove the dust, rubbish, and refuse from the said Hôtel Métropole contrary to the statute 18 & 19 Vict. c. 120, s. 125. Upon the hearing of the summons which was issued upon that information the magistrate decided that the refuse in question was not the refuse of a trade or business as was contended on behalf of the vestry, and that the vestry must therefore remove it, and that the hotel manager was not liable to pay the vestry any extra amount for doing so. The magistrate was then asked on behalf of the vestry, to state a case for the opinion of this court. This he declined to do, and upon these two grounds: "(1) that by sect. 129 of 18 and 19 Vict. c. 120, my decision in the matter is made final and conclusive; and (2) that no point of law arose in the case." I think that the learned magistrate was wrong, and that a case should be stated. There is no doubt that if sect. 129 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), stood alone the decision of the magistrate would be final and conclusive. But by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), which is a general enactment applicable to all proceedings in courts of summary jurisdiction, it is provided by sect. 33, that "any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the court to state a special case." Now, the obvious meaning of the Legislature was of a very wide description, namely, that whenever a point of law arose in a court of summary jurisdiction and one of the parties was dissatisfied with the way in which it was decided, such party should be at liberty to come to this court for the purpose of obtaining the opinion of this court upon such point of law. The provision in the Act of 1855 is modified by the Act of 1879. The magistrate has decided that no point of law arises, but there I cannot agree with him. The case includes the point as to what construction and interpretation is to be placed upon certain words in an Act of Parliament. It might be a question of fact if there were no dispute as to the meaning of the words in the statute, and as to the origin of the ashes. But the real controversy between the parties is what is the meaning of this expression in the statute? The first question is, were they "ashes?"

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and the answer to that depends upon the meaning of that word. Then, supposing that they are "ashes," do they come within the exception, or are the vestry bound to remove them without extra payment. I think that it is clear that there is a point of law involved in this case, and that the magistrate must therefore state a case for the opinion of this court.

MATHEW, J.—I am of the same opinion. The question arising in this case is one as to the construction to be placed upon certain words in an Act of Parliament. It is necessary to find out what was the meaning of the Legislature, and that is a point of law upon which the magistrate must state a case. There may be excellent reasons for deciding the case either one way or the other way, but we must see whether the magistrate has decided the point of law correctly, and in order that we may do so he must state a case.

Order absoluta.

Solicitors for the applicant, *Fladgate and Fladgate*.

Solicitors for the respondents, *Ingram, Harrison, and Ingram*.

QUEEN'S BENCH DIVISION.

Thursday, Jan. 30, 1890.

(Before FRY, L.J. and MATHEW, J.)

WHITEHURST (app.) v. FINCHER (resp.) (a)

Gaming—Illegal betting—Room "open, kept, or used" for betting—Person making bets in bar-room of public-house—The Betting Houses Act, 1853 (16 & 17 Vict. c. 119), ss. 1, 3.

A person on three successive days went to the bar-room of a public-house for the purpose of betting, and did there bet upon certain horse races with persons resorting thereto, but he had no interest in the keeping, management, or tenancy of the room, or of any part of the public-house.

Held, that as the room had not been opened, kept, or used for the purpose of betting, he had not committed an offence under the 3rd section of the Betting Houses Act, 1853, which imposes a penalty upon any person who being the owner or occupier of any house, office, room, or other place, or a person using the same,

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

shall open, keep, or use the same for the purpose of betting with persons resorting thereto.

Snow v. Hill (52 L. T. Rep. N. S. 859; 14 Q. B. Div. 588) followed.

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CASE stated by the stipendiary magistrate for the Wolverhampton and South Staffordshire district.

At a petty sessions held at West Bromwich, the defendant was charged on three several informations with having, on the 27th, 28th, and 29th days of June, 1889, unlawfully used a certain room, namely, the bar-room of the Dartmouth Hotel, West Bromwich, for the purpose of betting upon certain horse races with persons resorting thereto, contrary to sect. 3 of the Betting Houses Act (16 & 17 Vict. c. 119). It was proved that the defendant, on each of the days mentioned, went to the bar-room of the hotel for the purposes of betting, and did there bet with persons resorting thereto upon certain horse races. The defendant did not occupy any specific part of the room or bar, which was a public room, neither had the defendant any interest whatever in the keeping, management, or tenancy of the said room, or any part of the hotel.

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Person using
place opened,
kept, or used
for betting—
Customer
making bets
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For the defendant, it was contended before the magistrate that he could not be convicted under sect. 3 of the Act, as he only resorted to the room or bar as one of the public, although he did make bets with other people when there; and in support of this contention he relied on *Snow v. Hill* (*ubi sup.*).

For the complainant, it was contended that a "room" being designated by sect. 3 of the Act, the defendant "used" the same for the purpose of betting, and was therefore guilty of an offence under the section: (*Slatter v. Bailey*, 37 J. P. 262.)

The magistrate held that, although the defendant did in fact make use of the room or bar for the purpose of betting, and did in fact make bets there, still, as he had no interest in the room or any designated place therein, it was not such a user as was contemplated by the statute, and he dismissed the summons, but stated this case as to whether his determination was correct in point of law.

F. J. Lowe (*Shakespeare* with him) for the appellant.—It is submitted that the learned magistrate was wrong, and that he ought to have convicted the defendant. The question was, whether the defendant was a person using the place for the purpose of betting, and the magistrate found that he was not. It was not the intention of the Legislature that, to ensure a conviction, there should have been a previous user of the place for betting. The 1st section of the Act renders liable to prosecution as nuisances, houses opened, kept, or used for the purposes of betting; sect. 3 goes further, and says that people using such houses shall be liable to a penalty. [MATHEW, J.—That is for using rooms so opened, that is, opened for the purpose of betting.] The section is aimed at three classes of persons,

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Customer
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Betting
Houses Act,
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owners, occupiers, and users, and it was necessary to introduce this third class of persons, namely, persons "using" such houses, otherwise the section would have been restricted to owners and occupiers. The very introduction of those words shows that the Legislature meant "users" opening, keeping, or using such houses, as well as owners or occupiers opening, keeping, or using the same. [FRY, L.J.—If a person make a bet in his own house, is it a breach of an Act of Parliament, or can he be indicted criminally for it? If what you say is correct, it would be criminal to make a bet in any room.] This was a public place, in the public bar of a public-house, and the magistrate finds as a fact that the defendant went to the room for the purpose of betting, and did so bet. It is submitted that *Snow v. Hill* (52 L. T. Rep. N. S. 859; 14 Q. B. Div. 588) was wrongly decided, and that *Slatter v. Bailey* (37 J. P. 262) is in point in the appellants' favour.

The defendant did not appear.

MATHEW, J.—In this case the facts appear to be, that on three days the defendant went to a certain room or bar in a hotel for the purpose of betting, and did there bet with persons resorting thereto, upon certain horse races, and it was contended before the magistrate that he was using this bar for the purpose of betting within the meaning of the Act. That argument goes to the length of saying that, if a person makes a bet in any place, he comes within the scope of this Act of Parliament. We are bound by the Act, and it is important to see from the preamble of the Act what the object of the Act was. The preamble sets out that, "whereas a kind of gaming has of late sprung up to the injury and demoralisation of improvident persons by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, &c., for the suppression thereof, be it enacted, &c." Now, that preamble is explicit, and refers to betting-houses; and the statute goes on to enact in sect. 1 that "no house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, or occupier, or keeper, or any person using the same, betting with persons resorting thereto; then sect. 3 imposes a penalty upon "any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned," that is, for the purposes of betting with persons resorting thereto. Now the magistrate thought that, to bring the case within the Act, it was necessary to establish that the defendant used a room which had been opened, kept, or used for the purpose of betting. It appears to me that the magistrate was right, as it is not sufficient to show that the defendant went to this bar and there made bets. The case further seems to me to be governed by *Snow v. Hill* (*ubi sup.*), a case decided by a court of co-ordinate authority, and one therefore by which we are bound, though that case seems to

me to be perfectly correct, and the same arguments were used there as have been used in the present case. I think therefore the magistrate was quite right, and that the defendant ought not to have been convicted.

FRY, L.J.—I am of the same opinion. If we yielded to the arguments urged for the appellant, every bet would be a criminal offence unless made without using any room or house.

Appeal dismissed.

Solicitors for the appellant, *O. Robinson and Co.*, for *W. Shakespeare*, Birmingham.

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making bets
in licensed
premises—
Betting
Houses Act,
1858—16 & 17
Vict. c. 119,
ss. 1, 3.*

QUEEN'S BENCH DIVISION.

Friday, March 14, 1890.

(Before Lord COLERIDGE, C.J. and Lord ESHER, M.R.)

DAVIS (app.) v. STEPHENSON (resp.). (a)

*Gaming—Illegal betting — Betting outside licensed premises—
Depositing money inside—35 & 36 Vict. c. 94, s. 17 (Licensing
Act, 1872)—“Suffering house to be used,”—16 & 17 Vict. c. 119,
ss. 1, 3.*

*The landlord of licensed premises who knowingly allows his house
to be used as a place of deposit for money which has been received
in betting on a spot outside the area included in the licence can-
not be convicted of suffering his house to be used for the purposes
of betting.*

THIS was a case stated by the Recorder of Birmingham:—

The appellant, Frederick Davis, was convicted on the 9th day of July, 1889, by the stipendiary magistrate, of having, on Thursday, the 20th day of June, 1880, in the city aforesaid, then being the holder of a licence for the sale of intoxicating liquors by retail in a house and premises there situate, and known by the sign of the Justice tavern, unlawfully suffered his said licensed house to be kept and used in contravention of the Act 16 & 17 Vict. c. 119, intituled “An Act for the Suppression of Betting-houses,” contrary to the Licensing Act, 1872, and was fined 10*l.* and costs, the conviction to be endorsed on his licence.

(a) Reported by MERVYN LL. PEEL, Esq., Barrister-at-Law.

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Davis appealed to the Quarter Sessions in October, when the following facts were proved and set out in the case stated:

The appellant was on the 20th day of June, 1889, the keeper of a licensed beerhouse called the Justice tavern, in Moor-street, Birmingham. There was a side door to the Justice tavern which opened into an entry leading from Moor-street by the side of the Justice tavern, and terminating in a small piece of waste ground at the back of the Justice tavern. There was also a back-yard door which opened into the entry. This piece of waste ground on the other side was open to a public foot-road known as Nelson-passage. The back-yard door and the entry could be seen from the waste ground and from Nelson-passage. Neither the entry, the piece of waste ground, nor Nelson-passage was included in the licensed area, nor were they in the occupation of the appellant.

On the said 20th day of June a man named Adam Hicks stood in Nelson-passage and upon the waste ground from 12.30 p.m. to 2.35 p.m. During that time 188 persons (backers of horses, or their authorised agents) came up to him and each handed him a closed packet containing money wrapped up in pieces of paper upon which were written the names of horses running at Ascot races on that day which were intended to be backed, the name of the backer, the amount deposited for the purpose of backing each horse, and the hour at which the race was to be run.

These packets were delivered to Hicks, and received by him on an agreement that, if the horse therein named won the race named, Hicks was to pay to the backer the amount deposited in addition to the amount won, according to the odds current against such horse at starting.

None of the persons from whom the packets were received were proved to have been persons resorting to the licensed premises.

As the packets accumulated, Miss Davis, the daughter of the appellant, and who lived at home at the Justice tavern, came to Hicks during this time on three separate occasions, on each occasion receiving from him a number of the packets which he took from his pockets, and which she carried into the Justice tavern.

Upon a search-warrant being afterwards executed on the same day at the Justice tavern, the appellant was found behind the bar, and Hicks on the licensed premises in the public bar among the ordinary customers. The appellant had in front of him a glass containing money, and also a paper containing a list of names known as a "paying out sheet" (relating to other days than the 20th day of June) and used in connection with betting on horse racing. A number of papers forming part of the packets given to Hicks in Nelson-passage and on the waste ground on the same day, and which contained the names of horses, and the particulars above stated, were also found in an envelope in a drawer in the public bar near where the appellant was. These

packets, which had contained money, as well as the papers, had been opened, and their contents brought to the knowledge of the appellant.

Hicks was convicted by the stipendiary magistrate of using the waste ground and Nelson-passage on the 20th day of June, in contravention of the Act for the Suppression of Betting-houses, and was fined 20*l.* and costs, which were paid, and there was no appeal.

Hicks was a person using the said house, and Miss Davis acted in the aforesaid matters for him, and they were the persons alleged to have used the said house on the said 20th day of June, in contravention of the Act for the Suppression of Betting-houses.

Nelson-passage and the waste ground were resorted to, and the packets and the money were received there by Hicks and conveyed thence by Miss Davis, as his agent and on his behalf, into the Justice tavern for the express purpose of endeavouring to evade the Acts of Parliament, and with the knowledge and connivance of the appellant, who throughout aided and abetted Hicks and Miss Davis, and suffered his house to be used to receive the packets, well knowing that they were brought into his house on behalf of Hicks, and that they contained money which was received by Hicks as the consideration for an assurance to pay thereafter money on a contingency relating to horse racing.

The appellant contended that the Licensing Act, 1872, and the Act 16 & 17 Vict. c. 119, are not contravened unless the persons with whom the bets are made actually resort to the house or other place alleged to have been kept or used, or unless the money received by or on behalf of the keeper or person using such house or other place is actually received at such house or other place, and not merely carried there after having been originally received elsewhere.

The learned recorder overruled these contentions and dismissed the appeal with costs. The question for the opinion of the court was, whether the recorder was right.

Sect. 17 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), provides :

If any licensed person (1) suffers any gaming or any unlawful game to be carried on on his premises, or (2) opens, keeps, uses, or suffers his house to be opened, kept, or used in contravention of the Act 16 & 17 Vict. c. 119 (an Act for the Suppression of Betting Houses), he shall be liable to a penalty. . . .

Sects. 1 and 3 of 16 & 17 Vict. c. 119, provide :

Sect. 1. No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by, or acting for or on behalf of such owner, occupier, or keeper or person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race . . . or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing

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on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law.

Sect. 3. Any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them; and any person who, being the owner or occupier of any house, room, office, or other place, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them; and any person having the care or management of or in any manner assisting in conducting the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them, shall, on summary conviction thereof . . . be liable to a penalty.

Hugo Young for the appellant.—Could it be said that a man permitted to be done on his licensed premises what was, in fact, done outside them? The people resorted to the waste ground and the passage, and the money was received there. Sect. 1 is directed against two things only, namely, betting with persons resorting to a particular house, and using the house for the receiving of money. Neither of these has taken place here, therefore the conviction is bad. Were the conviction to be allowed to stand, the curious result would follow, that whereas Hicks has been convicted of using only the waste ground and passage for the purposes of betting, yet the appellant will have been convicted of allowing him to use his public-house for those purposes. If a man bet in a certain place and took the money and papers he received to his bank, and gave notice that he would pay the money at his bank, the bank could not be convicted of receiving the money. The Act of Parliament does not hit at betting, but at having a particular place to which persons may resort, or to which they may send their money. The only point is, did the people resort to the public-house, or was that the recognised place where the money was to be sent and received by Hicks? It was true the house was used for storing the money and the papers, but that was after their receipt by Hicks outside the licensed area. The paying out of the money to the winners was not part of the betting hit at by the statute. The moment it is found that the act of resorting and the act of receiving are not done on the licensed premises the statute does not apply, and the mere fact that, after the receipt of the money, another place is used as a sort of storehouse, is immaterial. If the appellant had been charged with receiving the money in the house himself the case might have been different, but he was charged with allowing Hicks to use his house for the receipt of the money. The cases of *Whitehurst v. Fincher* (88 L. T. 255) and *Snow v. Hill* (L. Rep. 14 Q. B. Div. 588, in which see the judgment of Smith, J.), showed that the place must not merely be one that is used for purposes connected with the actual betting, but must be a recognised place where the resorting or the receipt of the money takes place; otherwise the statute does not apply. Hicks, after the betting was over, went into the public-house as an ordinary customer, and what the statute forbids had been done before he went into the house. Even if it had been

given out that the winners would be paid at the public-house, that would not be an offence. Paying bets was not an offence against the statute. The case of *Bows v. Fenwick* (L. Rep. 9 C. P. 339) shows that it is quite lawful to bring all the paraphernalia of betting into a house so long as the people do not bet there. In *Reg. v. Cook* (L. Rep. 13 Q. B. Div. 377) it was held that, as the business of certain bicycle grounds at which betting had taken place was not that of illegal betting, the manager of the grounds was not liable under sect. 3. There Hawkins, J. went fully into the intention of the statute; and see also the judgment of Smith, J., p. 386. All these cases show that the statute does not intend to prevent betting. It does not intend to prevent people paying, or assisting to take care of the money or tickets in any way in connection with betting. What it does intend is to prevent any assistance in a particular form of betting; that is, having a place of any description which people may use, such as a place where one can go and make a bet. If this conviction were held good it would decide this: that what is meant by the statute is not merely a place where people resort and money is received for the purpose of betting; but that it also includes a house where such money or any paraphernalia can be carried, after the transaction, which constitutes the betting, is complete.

Poland, Q.C. (Russell Griffiths with him) for the prosecution.—The point reserved by the learned Recorder was, whether the offence of receiving by Hicks was completed outside the public-house. Now when the packets were given to Hicks they were closed. He did not wait to open them, but in connivance with the appellant employed Miss Davis to carry them into the public-house, where he afterwards went and opened them and made acquaintance with their contents. The receipt was not complete until this was done, because until then he did not know what the consideration was. Thus the public-house was made into the place of receipt, and was used by Hicks as a receiving office. There was in fact a continuing receipt, which did not become complete until the packets were opened in the public-house. Therefore there was a sufficient receipt by Hicks of the money inside the house to come within the section.

Lord COLERIDGE, C.J.—I come to the conclusion at which I have arrived with the greatest possible reluctance, because I feel that in a case which could be put somewhat stronger than the circumstances in this case, there could be what would seem like a careful and deliberate evasion of the Act of Parliament. On the other hand, I am unable to see how this conviction could be sustained without a liability to a similar conviction under a set of circumstances perfectly reasonable and not at all unlikely to occur, which would manifestly not be within the words of the Act of Parliament. Now Mr. Poland has stated—and his case fails unless he can show that it was so—that Hicks received the money in the house of Davis with the knowledge and sanction of

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Davis, and that Davis suffered his house to be used for the purpose of Hicks receiving his money therein, and Mr. Poland admits that unless the facts of the case will make out that conclusion in point of law this conviction is bad. Now what Hicks really did was to arrange with Davis that from time to time the money, which he had received on a waste place from persons with whom he bet upon certain terms written down inside certain packets containing their stake (on receipt of which different terms arose in each case), should be brought by him into Davis's house. What he did was, he got on a waste place, admittedly not part of the licensed premises, and there he made bets with persons. They put their money into pieces of paper which he put into his pocket or into a place in front of him, and from time to time the daughter of Davis the landlord came to this waste place and took into the house the packets of paper which had accumulated in the man's pocket or other place. Then when the betting was over Hicks went into the house, undid the packets, read what was written inside, and took out the money. Now, it is said that this was a receipt by him in the house. If I have at all accurately stated the facts, it is manifest from the mere statement that it was nothing of the kind, that the money was received by Hicks outside, and for his convenience was taken into Davis's house, there to be disposed of by-and-by in accordance with the arrangement. It would be a straining of the law to say that the money, which he received outside and sent by a messenger into the landlord's house, there to be dealt with by him by-and-by, was a receiving in the landlord's house. As far as the receipt was concerned, the money was in his own control. Afterwards he parted with it by arrangement with Miss Davis to be taken into the house. It is admitted that there must be a receipt in the house. Here it seems that there was no receipt in the house. I am quite aware that this may tend to the direct evasion of what the Act of Parliament lays down. Still I do not make Acts of Parliament; I must construe them. The conviction must be quashed.

Lord ESHER, M.R.—It is said that Hicks and Davis had been trying to evade the Act of Parliament, and that we ought not to let them evade it. Now, there is always a struggle going on between the law and people who want to break it; and the moment the law is passed their whole ingenuity is at once exercised to evade it. But, if the law is a penal law, the question is not whether they are trying to evade it, but whether they have successfully done so. Now, what is Davis, the man who keeps the public-house, charged with? He is charged with having unlawfully suffered his house to be used in contravention of the Act. He was found guilty of that, and he cannot be found guilty at all. The charge was, that he suffered Hicks to use his house in contravention of the Act. Did he suffer Hicks to use his house for the purpose of making illegal bets in it? Certainly not; that is not the charge. But did he suffer Hicks to

receive the money? Now, Hicks went on to a piece of waste ground, that is, the place where he advertised for the purpose of making bets. People come to him, and they bring him the money with the paper closed, in which are the terms of their contract. He agrees with them that, whatever the terms are inside the paper, the moment they give him that paper he accepts the bet. Well, what has happened with the money inside the paper? Why, he has received it. Now, all this is done on the waste ground, and the public-house is not used in the smallest degree for that purpose; and Hicks has the money. For the purpose of the man who has made the bet with him, he has received the money. After he has received the money he sends it to the public-house, and Davis receives it to keep it. What for? To keep it for him. That is the arrangement between them; and when Hicks comes and asks for it Davis will give it him. It is impossible, it seems to me, to say that Davis has suffered this public-house to be used for the purpose of Hicks making the bets there, or for the purpose of Hicks receiving the money there. Mr. Poland relies on the proposition that you can have a continuing receipt of money. There is no such thing as a continuing receipt of money. When people have got it, they have got it. They convicted Hicks of using that piece of waste ground or place in order to make bets with anybody who would resort to make bets there with him; but they have not made out any case against Davis within this Act of Parliament, and I think the indictment fails.

Solicitors for the appellant, *Sharpe, Parker, and Co.*, for *Horton and Redfern*, Birmingham.

Solicitors for the prosecution, *Soames, Edwards, and Jones*, for *O. A. Carter*, Birmingham.

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QUEEN'S BENCH DIVISION.

Thursday, March 13, 1890.

(Before Lord COLERIDGE, C.J. and Lord ESHER, M.R.)

RYLEY (app.) v. BROWN (resp.) (a)

Practice—Res judicata—Dismissal of charge on first hearing a bar to subsequent conviction—"Nemo bis vexari debet"—The Dogs Act, 1871 (34 & 35 Vict. c. 56), s. 2.

The appellant was charged with non-compliance, on the 21st day

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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of August, 1889, and ten days thereafter, with an order made by justices, under sect. 2 of the Dogs Act, 1871, requiring him to keep a dangerous dog under proper control. No evidence was given to support the charge except as to the 21st day of August, and the charge was dismissed on the ground that the offence had not been made out. Subsequently the appellant was charged with not keeping the dog under proper control on the 21st day of August simply; this charge was proved and the appellant was convicted.

Held (quashing the conviction), that, as the appellant was put in peril and might have been convicted on the first hearing, the matter was *res judicata* on the second hearing, and the maxim "*Nemo bis vezari debet*" applied.

APPEAL by way of case stated from a conviction for allowing a dangerous dog to be at large on the 21st day of August, 1889, by justices of the peace for the county of Cumberland, sitting as a petty sessional court for Allerdale-below-Derwent.

According to the facts it appeared that the appellant was originally prosecuted on an information charging him with non-compliance, on the 21st day of August, 1889, and ten days thereafter, with an order made by the justices, on the 1st day of August, 1889, under the Dogs Act, 1871 (34 & 35 Vict. c. 56), adjudging that the appellant was the owner of a dangerous dog, and requiring him to keep the same under proper control. On the hearing of this information, on the 3rd day of October, 1889, the respondent—a superintendent of police—admitted on cross-examination that he had no evidence to support the charge except as to the 21st day of August; thereupon the appellant contended that the alleged offence had not been made out. The justices adopted this contention, and the case was accordingly dismissed.

Shortly afterwards a fresh summons was taken out by the respondent, charging the appellant with not keeping the dog, on the 21st day of August, 1889, under proper control simply; on this summons being called on, the appellant's solicitor applied, under Jarvis's Act (11 & 12 Vict. c. 43), s. 14, for a certificate of dismissal of the former charge; this being refused, the clerk to the justices was requested to produce his minute-book, and the entries therein relating to the former hearing having been read, it was objected on behalf of the appellant that the matter was *res judicata* by reason of the dismissal of the former charge on the 3rd day of October, and that it could not again be reopened. The justices, however, overruled the objection, and, having heard the evidence, convicted the appellant, and imposed a penalty of ten shillings for not keeping the dog under proper control on the 21st day of August, 1889.

From this conviction the present appeal was brought, and the point of law raised was, whether the question was *res judicata* before the second hearing, the justices expressly stating that they

had held otherwise on the grounds, (1) that the former decision was not on the merits; (2) that the offences charged were different, inasmuch as a penalty not exceeding 1*l.* only could be imposed on the second information, whereas a penalty of 11*l.* might have been imposed on the first.

Sect. 2 of the Dogs Act, 1871 enacts :

Any court of summary jurisdiction may take cognisance of a complaint that a dog is dangerous and not kept under proper control, and if it appears to the court having cognisance of such complaint that such dog is dangerous, the court may make an order in a summary way directing the dog to be kept by the owner under proper control or destroyed, and any person failing to comply with such order shall be liable to a penalty not exceeding twenty shillings for every day during which he fails to comply with such order.

Cavanagh for the appellant.—The matter was clearly *res judicata*; the tests are whether the evidence on both occasions was the same, and whether the appellant had on the first charge been put in peril. He certainly had been put in peril, and the statement of the justices that they had not decided on the merits cannot alter the facts: (*Reg. v. Brakenridge*, 43 J. P. 293).

The respondent did not appear.

Lord COLERIDGE, C.J.—This case is within the principles recently discussed by the Court for Crown Cases Reserved in *Reg. v. Miles*. (a) The appellant was obviously put in peril on the first hearing, and the maxim *Nemo debet bis vexari* applies.

Lord ESHER, M.R.—The justices were wrong on both occasions; they had power to convict on the first occasion, but did not exercise it.

Appeal allowed with costs. Conviction quashed.

Solicitors for the appellants: *Harrison and Powell*, for *McKeever and Son*, Carlisle.

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QUEEN'S BENCH DIVISION.

March 14 and 15, 1890.

(Before Lord COLERIDGE, C.J., and Lord ESHER, M.R.)

REG. v. EVANS AND OTHERS. (b)

Justice of the peace—Jurisdiction—Summons for libel—Power to adjourn when civil proceedings pending between other parties arising out of same matter—What is exercise of discretion.

(a) Since reported, *ante*, p. 9; 62 L. T. Rep. N. S. 572; 24 Q. B. Div. 423; 59 L. J. 56, M.C.

(b) Reported by MERVYN LL. PHIL, Esq., Barrister-at-Law.

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A magistrate cannot consider judicially, as ground for adjourning a summons for libel, pending civil proceedings between different parties for a different libel, though arising out of the same matters.

ON the 24th day of January, 1890, a rule *nisi* was obtained for a *mandamus* calling upon David Evans, Esq., alderman, one of Her Majesty's justices of the peace for the city of London, and Alfred Macdonell Green and John Bradley, to show cause why the said alderman should not proceed to hear and determine the matter of the information and complaint of one Irenæus Mayhew, charging the said A. M. Green and John Bradley with libel. The facts as stated in the affidavits were as follows: A. M. Green, a financial agent, had brought an action then pending for libel against a paper called the *Financial Times*, in which the proprietors, and one Grant, a sub-editor, and the printer were defendants. In the course of the proceedings Green had made affidavits, the substance of which he printed and published in a pamphlet entitled "Blackmailing—Green v. *Financial Times*," and directed against the *Financial Times*. Mayhew, a canvassing agent for advertisements for the *Financial Times*, thereupon took out a summons against Green for libel in respect of certain passages in the pamphlet, and D. G. Macrae, managing director and editor of the same paper, took out a summons, and also commenced civil proceedings against Green for libel in other passages of the pamphlet which he considered reflected upon him. Both summonses came on for hearing on the 24th day of September, 1889, when the sitting magistrate, Mr. Alderman Evans, being informed by counsel of the civil proceedings pending between Green and the *Financial Times*, and between Macrae and Green, adjourned both summonses until the 4th day of October. Upon that day the summonses were further adjourned by Alderman Evans until the 3rd day of January, 1890, for the same reason.

On the 3rd day of January Macrae withdrew his summons, and it was dismissed, he being content with taking civil proceedings in respect of the alleged libel upon him in Green's pamphlet; but Alderman Evans again further adjourned Mayhew's summons until the 3rd day of July, 1890, and in his affidavit stated that he did so because, "although in the said pamphlet attacks were made upon persons not directly parties to the said civil proceedings, yet those attacks were made incidentally to, and as part of the general attack upon the *Financial Times* and its conductors, and that the whole subject-matter of those attacks would in all probability be dealt with in the said civil proceedings then pending," and because he considered that in such circumstances he ought to follow the practice which he believed to be general both in the metropolis and the country, and which was thus stated in Oke's Magisterial Synopsis:

As a general rule a magistrate ought not to entertain criminal charges arising out of

civil proceedings which are still pending; at all events, except for the purpose of holding the accused to bail, unless the trial has been postponed to allow the criminal charge to be first disposed of.

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Neither Macrae nor Mayhew were parties to the action of Green against the *Financial Times*. Neither was Mayhew a party to the action of Macrae against Green. In consequence of the statements in the pamphlet Mayhew had been suspended from his duties on the *Financial Times*, and suffered great annoyance from the charges hanging over him, and from his being prevented from proceeding with his prosecution of Green because of the adjournment of his summons until after the expiration of civil proceedings to which he was no party.

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Poland, Q.C. (Forrest Fulton with him) now showed cause.—The magistrate had a right to adjourn the summons. There was no bail. It was simply a process to bring Green and Bradley before the court, and the alderman in the exercise of his discretion adjourned the summons until the 3rd day of July. The reason why the pamphlet is called "Blackmailing—Green v. *Financial Times*," is that it is written by Green in his own defence in the action which he has brought against the *Financial Times*. This action is pending, and an injunction has been obtained restraining Green from circulating the pamphlet. The alderman thought it better on the whole to adjourn the case, if the prosecution intended to go on with it. Supposing he adjourned it for too long a period, that is not a declining, in any way of jurisdiction. The magistrate has the same right as any other court to postpone the case if he thinks there is reason to justify him. He had this case legally before him. He exercised his best judgment in the matter, and is most anxious to receive the directions of the court upon the point.

Horace Avory for the defendant Green.—The court ought to be informed of the fact that there is an action for slander—practically the very same thing that is contained in this pamphlet—brought by Mayhew against Green, and now pending in the Mayor's Court. Although there is no law which makes pending civil proceedings a bar to a criminal prosecution for libel, yet such is the practice. The court should not overrule the magistrate's decision, if he acted within his discretion in adjourning the summons.

Danckwerts (in support of the rule).—This adjournment is in consequence of some wholly extra-judicial information. If it is allowed, it amounts to a licence to Green to write any kind of libel that he likes for a long time with no possibility of any proceedings by law. Assuming that the magistrate has power by these continual adjournments to practically put off the case, he can only exercise his power to adjourn upon proper judicial grounds. So long as he does that, this court cannot interfere with him. But if he does so on extra-judicial grounds, and outside the case, that is not a proper exercise of his authority: (*Reg. v. Adamson*, 1 Q. B. Div. 201.) There is no rule recognised by the law

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of England that a magistrate may adjourn because there are some proceedings of a civil nature pending which may or may not have something to do with the case. Such grounds are not judicial, and even though he had evidence before him of the pending of the civil action, he had no right to consider them. See the judgment of Blackburn, J. in *Reg. v. Fawcett* (11 Cox C. C. 305). The magistrate could not have properly exercised his discretion about the action in the Mayor's Court, because that was not before him, and unless he had the admission of one of the parties to it, or sworn information as to its existence, he might just as well take judicial notice of anything he had heard in the highways and byeways of the City. See *Ex parte Woolf* (H. T. 1871, not reported), cited by Sir Hardinge Giffard in *Reg. v. Adamson* (*ubi sup.*).

LORD COLERIDGE, C.J.—I have, with the greatest reluctance, come to the conclusion that a *mandamus* must go. Never, if I can possibly avoid it, will I interfere with the discretion of a magistrate, even where it has been exercised in a way in which I perhaps should not have exercised it myself, and still less where I am satisfied with the discretion. But it is an established rule of this court that the discretion of magistrates must be exercised upon fitting materials, and if a decision, and possibly a determination, has been come to on grounds not fitting, and outside those which by law a magistrate is entitled to consider, there the court will look at the matter as if the discretion had not been exercised at all, and will by *mandamus* compel the magistrate to exercise that discretion which he has, in truth and in contemplation of law, not exercised. In this case I cannot fail to see from the affidavit of Mr. Alderman Evans that he has acted with every intention of doing what was right in the matter, upon materials which are unfit for his consideration, and which therefore must not be taken by the court into consideration in determining the question whether he has exercised his discretion rightly or not. He must have thought that matters would come out in the trial of the civil action which might show that there ought not to be any indictment at all. But those were grounds which in point of law he ought not to have considered. I do not wonder, having had the advantage of trying one or two cases lately connected with this particular paper, that the alderman thought it desirable that the whole matter should be out before the jury before they heard a criminal charge, but I am unable to see that that is any legal ground for his adjourning the case. The matters which are between the prosecutor and the defendants in this indictment may or may not be inquired into, or they may or may not be inquired into with the same advantages of full investigation that would be presented on the trial of an indictment between these two parties; but the magistrate, as I have said, is not entitled to look at general considerations of this sort as ground for the non-exercise of his jurisdiction. In the case of *Reg. v. Adamson*, the three judges who decided it were careful

to say that they had no doubt that the justices acted with the purest motives. But the three judges all said that it was plain that the magistrates had allowed considerations of convenience and general advantage to the district to affect their decision which they should not have taken into account. They did not exercise their jurisdiction on judicial grounds, and *Reg. v. Adamson* is abundant authority for us to say that the magistrate looked at materials at which he had no right to look, and by which, as a judge, he had no right to be influenced. The next point is whether by exercising the power of adjournment in the way in which he has exercised it, he has really in a way continued his jurisdiction, and has postponed for a time the final determination as to whether he would or would not allow an indictment to be preferred. If it was four o'clock in the afternoon and he was tired; or if he was ill, and he had adjourned the case for a week, I have not the slightest doubt that he would have jurisdiction to adjourn. But that is not what he did. First he adjourned for a week, then he adjourned again until the 3rd of January in the present year, and on the 3rd of January he adjourned for six months on grounds that we think extra-judicial. It was really putting under the form of adjournment a declining to hear the case altogether for six months, not upon any grounds as to the materiality of the case itself. He exercises his power of adjournment unreasonably under the circumstances, because brought about by reasons which ought not to have justified him in acting at all. I think it right to add that this is merely putting the magistrate in motion. We do not bind the magistrate to decide one way or the other. I only desire to guard myself against it being supposed that by sending this case back to the magistrate we give him any hint as to the way in which we think he ought to determine it. He will no doubt give judgment according to the principles of law.

Lord ESHER, M.R.—In this case there was a summons before the magistrate by a Mr. Mayhew against Green for an alleged libel on Mayhew by Green in a pamphlet; and I think the magistrate, intending to exercise his discretion as to an adjournment, adjourned the hearing of that summons, declaring and intending to adjourn it until after the trial of a certain civil action. The question is whether the court ought to interfere with him by *mandamus*, and to direct him to hear the summons at once; and upon hearing it, either to commit the person charged with the libel, or to dismiss the summons. Well, if the magistrate has exercised his discretion upon legal grounds, it is well recognised that the court will not interfere with him merely because they would have exercised the discretion in another way. But if he has exercised his discretion illegally, then the court will insist that he shall exercise that discretion according to law. Now the case of *Reg. v. Adamson* shows at all events under what circumstances the court is bound to say that a magistrate has exercised his discretion illegally. That is stated

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by Cockburn, C.J., who there lays it down that if the magistrates had exercised their discretion on something extraneous or something illegal, it is the same as declining jurisdiction; and if a magistrate declines to exercise his jurisdiction, he must be compelled to exercise it by a writ of *mandamus*. The question here therefore is whether in exercising or attempting to exercise his jurisdiction in adjourning this summons the magistrate has acted upon facts which, legally, he ought not to have taken into consideration. Well, now, on what did this magistrate act? Here was a summons before him by Mayhew against Green for an alleged libel in a pamphlet, and the matter which he has taken into consideration is this—that there was pending a civil action between Green and others for a libel on Green in the *Financial Times*. So that, in order to adjourn a summons for an alleged libel by Green in the pamphlet on Mayhew, he has taken into consideration that there was an action pending for another libel in a different paper called the *Financial Times*. If so, his action in this case is brought directly within the rule of *Reg. v. Adamson*. The *mandamus* must go to him upon this summons. We give no intimation as to the way he shall determine it.

Solicitors: In support of the rule, *Ralph Raphael*; against the rule, *Crawford*; for the defendant Green, *F. G. Gorton*.

QUEEN'S BENCH DIVISION.

March 21 and 28.

(Before Lord COLERIDGE, C.J. and Lord ESHER, M.R.)

REED v. NUTT. (a)

Assault—Complainant not appearing before magistrate—Charge dismissed—No evidence taken on oath—"Hearing upon the merits"—Certificate of dismissal—Power to grant such certificate—Whether such certificate is a bar to subsequent civil proceedings—24 & 25 Vict. c. 100, ss. 44, 45.

Sect. 44 of 24 & 25 Vict. c. 100, enacts that, upon the hearing of any case of assault or battery "upon the merits," if the justices deem the offence not to be proved, they shall dismiss the complaint and shall give to the party against whom the complaint

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

was preferred a certificate stating the fact of such dismissal; and sect. 45 provides that the person who has obtained such certificate of dismissal "shall be released from all further or other proceedings, civil or criminal, for the same cause."

Held, that a magistrate has no jurisdiction under sect. 44 to grant a certificate on the dismissal of a summons for assault, when the complainant does not appear and when no evidence on oath is taken, as such a hearing is not a "hearing upon the merits," and if the magistrate does grant a certificate, such certificate is not a binding certificate, both parties not having been present, and the case not having been argued and decided on the facts.

Held also (Lord Coleridge, C.J. doubting, but not dissenting), that, if in such a case the magistrate grants a certificate of dismissal, the judge in a subsequent action for damages in respect of the same assault is not bound by such certificate, but has power to go behind the certificate and to inquire into the facts, and to determine whether facts existed which gave the magistrate jurisdiction to grant the certificate.

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APPEAL from Lambeth County Court, in an action for damages for assault, which was tried before the judge and a jury, and in which the judgment was entered for the plaintiff for 15*l.*; the only question being whether a certificate given by a police magistrate in respect of the same assault, under 24 & 25 Vict. c. 100, sect. 44, was a bar to the action, the judge having given leave to appeal on that point.

The plaintiff had gone before the police magistrate at Lambeth Police-court, and had made a complaint that he had been assaulted by the defendant, a police constable; a summons for such assault was granted against the constable, but, as the plaintiff in the meantime, with a view to civil proceedings, had resolved not to proceed further with the criminal proceedings for the assault, he sent a notice to the magistrate and also to the defendant that he did not intend to appear at the police-court, and that he had abandoned the criminal proceedings.

The plaintiff did not appear at the police-court. When the summons was called on the constable appeared, but, as the plaintiff did not appear, no person was sworn and no evidence of any kind was given upon oath, but the magistrate looked at the constable's report, heard what he had to say—the constable not having been sworn—and he then dismissed the charge, and granted to the constable a certificate of dismissal, under the 44th section of 24 & 25 Vict. c. 100.

The plaintiff subsequently took civil proceedings in the Lambeth County Court in respect of the same assault, and the defendant put in as a defence and bar to the plaintiff's claim the certificate of dismissal granted by the magistrate, and offered no other evidence. The defendant admitted that there was no evidence on oath taken before the magistrate.

The learned judge held that there was not a "hearing upon

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the merits" within the meaning of the section, that therefore the certificate ought not to have been granted, and that he had power to go behind it. The charge of assault was then heard upon the merits, the jury found that the assault was proved, and judgment was given for the plaintiff.

The defendant appealed.

Sect. 44 of 24 & 25 Vict. c. 100, provides :

If the justices, upon the hearing of any such case of assault or battery upon the merits, where the complaint was preferred by or on the behalf of the party aggrieved, under either of the last two preceding sections, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred.

Sect. 45 provides :

If any person, against whom any such complaint as in either of the last three preceding sections mentioned shall have been preferred by or on the behalf of the party aggrieved, shall have obtained such certificates, or, having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment or imprisonment with hard labour awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause.

Avory for the appellant.—The certificate was on the face of it perfectly good and regular, and was binding upon the County Court judge, and he had no power to inquire into it. It was contended before the judge that the case was not heard upon the merits; but there was a hearing upon the merits, as the magistrates heard what the defendant had to say, and looked at his report, and he dismissed the charge. There was thus a hearing upon the merits; but even if there was no hearing upon the merits, there was before the County Court judge a certificate of dismissal, good on the face of it, and made by a judge who had jurisdiction to give such certificate, and the County Court judge had no power to go behind such certificate and inquire whether there was or was not a hearing before the magistrates.

Rawlinson (*Fillan* with him) for the respondent.—The certificate is bad under the 44th section, not having been granted after a hearing upon the merits. There was no evidence upon oath, no person was sworn, there was no hearing of the facts, and therefore there was no hearing of the case "upon the merits" within the meaning of the section; and a certificate under that section can only be given after a hearing upon the merits, which means some hearing of the facts. The present section differs from the corresponding one of the Act of Geo. 4 (9 Geo. 4, c. 31, s. 27), as that section did not contain the words "upon the merits." If the complainant does not appear, then the magistrates can dismiss the summons, but he cannot grant a certificate. I do not complain of the dismissal of the summons, but before a certificate can be granted there must be a hearing upon the merits, and no such certificate can be granted unless the complainant consent to the proceedings. This is shown by the case

of *Nicholson v. Booth and Naylor* (58 L. T. Rep. N. S. 187; 57 L. J. 43, M. C.), where the court held that a court of summary jurisdiction have no power to convict of a common assault unless the party aggrieved, or someone on his behalf, complains of the assault with a view to the adjudication of the court upon it. At common law there is nothing to prevent a person bringing an action in a criminal proceeding: (*Ex parte Ball*; *Re Shepherd*, 40 L. T. Rep. N. S. 141; 10 Ch. Div. 667; *Wells v. Abrahams*, 26 L. T. Rep. N. S. 433; L. Rep. 7 Q. B. 554.) [Lord COLERIDGE, C.J.—Can a man indict another for libel, and at the same time bring a civil action against him? If so, it would be a case of *bis vexari pro eadem causâ*.] If the law were not as I am contending for, there would have been no need to insert in sect. 44, the provision as to the certificate. The only way this certificate can be used is under sect. 44, and that can only be after a hearing upon the merits. [Lord ESHER, M.R.—If after the dismissal of the summons no certificate had been granted, could an action have been maintained?] I submit so. [Lord ESHER, M.R.—I have not the least doubt that a man cannot be convicted twice criminally; but is there any case in the books which shows that, if a person has been convicted, the complainant cannot afterwards bring an action for the damages?]

Avory in reply.—Before the County Court judge the objection was taken that he had no power to go behind the certificate. If that is not a good objection, it would be open to any County Court judge, when a magistrate had convicted a person, to consider whether the conviction was right or wrong. The only way to question the certificate is by *certiorari* to bring up the certificate to have it quashed, and on that *certiorari* the question can be argued that this was not a hearing on the merits. Suppose the magistrate here had convicted the defendant without any evidence at all, the County Court judge could not have treated that conviction as bad, as he would have no power to go behind it; this court only can deal with it by *certiorari*, or it may be dealt with by appeal if there is an appeal. As soon as the summons is issued, the magistrate has jurisdiction, the parties cannot then withdraw; and if the parties do withdraw, that does not deprive the magistrate of jurisdiction, and he has still power to hear and convict or to dismiss the complaint; so that the magistrate here clearly had jurisdiction: (*Reg. v. The Justices of Wiltshire*, 8 L. T. Rep. N. S. 242.) [Lord ESHER, M.R.—It is not doubted or denied here that the magistrate had jurisdiction to dismiss the summons, but it is the very point whether he had jurisdiction to give the certificate.] It was laid down in *Handcock v. Somes* (28 L. J. 196, M. C.; 1 E. & E. 795), that the granting a certificate of dismissal under sect. 27 of 9 Geo. 4, c. 31, was a ministerial and not a judicial act. The moment the summons is dismissed, the granting of a certificate is a ministerial act. The magistrate having jurisdiction to hear the summons, the County Court judge cannot go into any question as to how

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he has exercised that jurisdiction, nor can he go behind the certificate which is good on the face of it.

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March 28.—Lord ESHER, M.R.—This is a case in which the plaintiff brought an action in a County Court for assault, and the defendant in that action disputed the assault, as to that, the County Court judge and a jury have found that the assault was committed, and gave damages against the defendant; but the defendant in the proceedings before the magistrate had got a certificate under 24 & 25 Vict. c. 100, sect. 44, and on the trial of the action the County Court judge received evidence of what took place in the police-court, and of the circumstances under which the magistrate had granted the certificate. Before the assault case came on in the police-court the plaintiff gave notice to the defendant that he did not intend to proceed with the case before the magistrate. When the summons came on the plaintiff did not appear, but the defendant appeared, stated his case, and asked the magistrate to dismiss the information and grant him a certificate. The magistrate did dismiss the information, the defendant being there, and the prosecutor, the complainant, not being there. That the magistrate had jurisdiction and power to dismiss the information, and that he was quite right in so dismissing it, cannot be denied and is not denied here; but it was under those circumstances that he gave the certificate. Now the questions raised are, first, whether the magistrate had any jurisdiction, not to dismiss the information, but to give the certificate which has been produced as a binding certificate; secondly, if he had not, was the County Court judge entitled to hear the circumstances under which the magistrate had given the certificate, and to determine that these circumstances were not such as brought the case within the Act of Parliament enabling the magistrate to give a certificate, and if they were not, to say that the certificate was given without jurisdiction on the part of the magistrate? Now the first point depends on what is the true construction of the statute. It is a statute which has replaced a former statute as to the granting of certificates in such cases. The new statute has altered the circumstances of such an assault in many respects, and amongst others in this: Under the former Act (9 Geo. 4, c. 31, s. 27) the words of the statute were to this effect, that, if the justices upon the hearing of any case of assault or battery shall grant a certificate, that certificate shall prevent a civil action being maintained. That was upon the hearing. Now upon that statute, and upon those words, two cases were decided by the Superior Court: one of these was the case of *Tunnickiffe v. Tedd* (17 L. J. 67, M. C. ; 5 C. B. 553); in that case, where precisely the same circumstances arose as in the present case, namely, an information laid and withdrawn, the prosecutor not going before the magistrate, the court held that the magistrate had heard the case, although no evidence was given. As I have already pointed out, the words of that section were, "If the

justices upon the hearing," and the court in the case I have referred to, held that what took place before the magistrate was a hearing. Some of the judges have stated in one of the cases that that was a strict interpretation, and was rather technical, but still they considered that was the meaning of the Act of Parliament. That was confirmed and followed in the case of *Bradshaw v. Vaughton* (3 L. T. Rep. N. S. 878; 30 L. J. 93, C. P.). Those were cases upon the old Act of Parliament. Now that Act of Parliament having stood with these words in, and such an interpretation having been put on those words, we have the new Act of Parliament using the very same words. "If the justices upon the hearing of any such case of assault or battery shall grant a certificate," were the words of the old Act of Parliament, and then in the new Act, there are added the words "upon the merits." Now the question is, whether we can after that say that these words "upon the merits" are intended to signify precisely the same thing; that is, that the phrase with those words in them is to have precisely the same meaning as the old Act had when those words were left out. I cannot but think that, the attention of Parliament having been called to the strict meaning which had been given to the words of the Act "upon the hearing," a construction which was said to be somewhat technical, they put in those words, "upon the merits," with a definite intention, namely, that a party should not have really the same case tried twice and decided twice. They put in the words "upon the merits," in in order to say that, if the case was heard before the magistrate, that is, that if the dispute was fought out by the parties before the magistrate, that should be a hearing "upon the merits," and the magistrate was to give a certificate; but if the case was withdrawn from the magistrate really, so that there was no real trial of it at all, and so that nobody could assert that the facts had been ascertained by a judicial tribunal, or that the law as applicable to the particular facts had been ascertained, then it was to be left open to the person who had gone so far as to lay the information, but had done nothing more, to be remitted to his old common law rights, which were that, notwithstanding criminal charges, he was entitled to maintain an action for injury done personally to himself. That was the meaning of it. If so, the magistrate has no jurisdiction to give the certificate as a binding certificate, unless the case has been before him and has been argued; that is to say, unless the parties have been present before him, so that he has to decide on the facts and the law as applicable to those facts. Now, if that be true, this magistrate had no jurisdiction to grant the certificate as a binding certificate. Then comes the second question, Was the learned County Court judge entitled to consider the circumstances which show conclusively that the magistrate had no jurisdiction; or was he bound by the mere presentation of the certificate, and ought the certificate to have been removed by *certiorari* into the Queen's Bench Division, and set aside? That

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is rather a technical question. In many cases it has been decided that the decision of a magistrate, or other authority, must be set aside in the Queen's Bench; but it has not been so in all cases. I know of no principle of law which lays that down as a universal rule. When we look at the cases I have already mentioned, in one case the County Court Judge did receive such evidence, and the opinion of the court was taken upon whether the County Court judge had decided rightly on the facts as to jurisdiction; and in the other case before a judge of the Superior Court at Nisi Prius at the assizes, I think he also received evidence in order to determine whether the magistrate had jurisdiction or not. They are both cases, therefore, in which the Superior Court recognised the right of the person trying the civil action to go so far, and so far only, that is, to determine whether facts existed which gave the magistrate jurisdiction. I do not think we ought to overrule those cases; and I think, therefore, we ought to say that here the County Court judge had jurisdiction only to determine whether facts existed which gave the magistrate jurisdiction. If the magistrate had once jurisdiction the County Court judge could have nothing to say with regard to the certificate. Under these circumstances, I think the County Court judge was quite right on both points, and therefore judgment must follow accordingly, and this appeal against his decision must be dismissed.

Lord COLERIDGE, C.J.—I have come reluctantly upon the whole to the same conclusion. Upon the first point I agree entirely with what the Master of the Rolls has said. I think it is impossible, without unreasonable minuteness and subtlety (the two cases to which the Master of the Rolls has referred having taken place before the passing of the second Act), to disregard the insertion of the words "upon the merits" in that Act, and to hold they make no difference in the Act. On the first point, therefore, I agree with the Master of the Rolls. I think the second Act does require a hearing of a more complete kind, of a more substantial kind, than was held to be sufficient in the two cases to which he has referred, which I have carefully looked at; and although those cases would have been authority if the old Act had remained in existence, I think they are no longer authority, because they apply to an Act of Parliament which is no longer the law of the land, but has been repealed by Parliament itself. I have had very much more doubt upon the second point, and I confess I rather yield to the arguments and the authority of the Master of the Rolls than have any very clear and distinct opinion of my own, that the County Court judge has power to go behind the certificate of a court of competent jurisdiction, or a magistrate of competent jurisdiction, and inquire whether—the certificate being admitted to be correct, and admitted to have been properly issued so far as form goes—there was jurisdiction or not. I am unable, however, to deny that there have been cases in which that has been done. I cannot refuse to assent to the proposition of the Master of the Rolls, that several times over the courts either have

decided, or appear to have decided, that a magistrate may do that. There are cases which tend the other way; but sitting here I do not feel at liberty to differ from those cases that have decided that the magistrate's certificate may be inquired into. Therefore, being quite clear upon the first point, and on the second having some doubt, I yield to the judgment of the Master of the Rolls and do not differ from him. I desire only to add a few words with regard to a case which I should have thought binding upon us—I mean the case in the Court of Criminal Appeal. The circumstances differ in the present case, because there was undoubtedly a conviction, and the question there was whether, upon well understood principles, a second conviction upon a matter which could have been decided on the first conviction was or was not good. The whole court held that it was not good, and my brother Hawkins in an able and elaborate judgment, he having first differed from the rest of the court, persuaded himself we were right. Therefore, that was an unanimous decision of the Court of Criminal Appeal that in that case, and under those circumstances, the certificate of the magistrate was conclusive. But the circumstances were different from the circumstances here, and that makes that case an authority not binding upon us. Therefore, on the whole, I agree that this appeal must be dismissed, and dismissed with costs.

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Appeal dismissed.

Solicitors for the appellant, *Wontner and Sons*.

Solicitors for the respondent, *Bordman and Co.*

CROWN CASES RESERVED.

May 12 and 17, 1890.

(Before Lord COLERIDGE, C.J., HAWKINS, MATHEW, DAY, and GRANTHAM, JJ.)

REG. v. SOLOMONS. (a)

Larceny—Obtaining money by trick—Purse trick—Pretence of dropping several shillings into purse—Shilling obtained in exchange for purse and its supposed contents.

In support of an indictment for the larceny of three shillings and sixpence it was proved that the prisoner had obtained possession

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

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of a shilling, and then of a half-crown, from the prosecutor by means of what is known as the purse trick. That is to say, he had induced the prosecutor to give him a shilling for a purse, into which he had dropped three coins, by first showing the prosecutor three shillings, and then making it appear as if he had dropped them into the purse. In the same way he had induced the prosecutor to give him a half-crown for a purse into which he had made it appear that he had dropped two half-crowns. Having been convicted of obtaining the money by means of a trick, upon a case reserved for the opinion of this court :—

Held, that the prosecutor having parted with the property in his shilling and half-crown in exchange for the purses and their contents, the prisoner had been guilty, if at all, of obtaining the coins by means of a false pretence, and could not be convicted of larceny.

CASE stated by the Deputy-chairman of the London County Quarter Sessions, as follows :—

The above prisoner was tried before me on the 20th day of February, 1890, upon an indictment which charged that he “did on the 2nd day of February, 1890, feloniously steal, take, and carry away three shillings and sixpence, the property of Edward Davy.” The second count charged him “with feloniously receiving the same well knowing it was stolen.”

The prosecutor Edward Davy deposed as follows :

That on the 2nd day of February in this year I was near Aldgate, when the prisoner came up to me. At that time there was another man standing a little way off selling purses. The prisoner said, “I’ll show you how the trick is done.” He then opened a purse which he had in his hand, and putting three shillings in his other hand said, “You see there are three shillings there,” I said “Yes.” He then dropped them, or appeared to do so, into the purse. He then asked me if I would give him one shilling for the three shillings and the purse. I hesitated, but afterwards gave him a shilling for the three shillings and the purse, and put the purse into my pocket. He then pulled out another purse, and showing two half-crowns in his hand, put them, or appeared to put them, into the purse, and asked me if I would give him half-a-crown for the two half-crowns and the purse. I gave him half-a-crown. The prisoner then said, “Just to show that I am not cheating, and to let the public see it, you had better give me one-and-sixpence for myself,” which I did. I then walked a little distance away and opened the first purse which he had said contained three shillings, and found only three halfpence. In the second purse which was said to contain two half-crowns, I found two penny pieces only.

In cross-examination the prosecutor stated that the prisoner promised him three shillings for one shilling, that he bought the three shillings and the purse, that he did not buy on speculation, and that he was willing to take the half-crown, if the prisoner was willing to part with it; that he never said that he parted with his money to see how the trick was done, and that at the time he was on his way to the Tabernacle to hear Mr. Spurgeon.

Another witness named Norfolk in every particular corroborated the story, but his evidence will be unnecessary to give in detail.

A constable named Burnett was also called, and stated that he took the prisoner into custody for stealing three shillings and

sixpence. Prisoner in reply said, "Serve him right, more fool he to buy them." On being searched there were found on prisoner seven purses and eleven shillings in silver. The prosecutor on being recalled stated that he did not care for the purses, but that he wanted the money which the prisoner promised.

Upon this state of facts it was argued by counsel for the prisoner, that the prisoner ought not to have been indicted for larceny, because the prosecutor voluntarily parted with his money, both the possession and the ownership, in return for the money which he hoped to get. Cases were quoted in support of this statement.

I overruled the objection, and pointed out that in my opinion there was no difference between the present state of facts and the crime of larceny as committed in the case of "ring dropping," and that although the indictment might have been framed for obtaining money by false pretences, the present one was equally good to maintain the crime of larceny by a trick.

The verdict was as follows :

We find the prisoner guilty of "obtaining" the money by a trick. I asked the jury what they meant; did they mean that the prisoner committed the crime of larceny by a trick as explained by me? and they answered in the affirmative.

I, considering it of importance to have it determined whether this form of crime came within the misdemeanour of obtaining goods by false pretences, or whether it was a felony, decided to state this case, which I respectfully do, for the consideration of the Court of Criminal Appeal.

The question for the opinion of the court is, whether I was right in holding and directing the jury that the prisoner might be convicted of larceny by trick.

Keith Frith, on behalf of the prisoner.—There was no larceny or trick here, for wherever the ownership as well as the possession of goods is parted with, there can be no larceny. The prisoner should have been indicted for obtaining the coins by false pretences. Where it has been held that there has been larceny by a trick, such as the confidence trick, the possession and not the ownership has been parted with. [Lord COLERIDGE, C.J.—In *Reg. v. Robson* (R. & R. 413) money was deposited for a pretended bet, and it was held to have been a case of larceny.] That was because there the money was only deposited, and though the possession was parted with the ownership of the money did not pass. In *Reg. v. Wilson* (8 C. & P. 111), the ring-dropping case, it was held to be a case of false pretences. [The Court here adjourned, and upon re-assembling on the 17th day of May, called upon the counsel for the prosecution to support the conviction.]

May 17th.—*Slade Butler* for the prosecution.—The question here is, whether or not this particular trick comes within the definition of larceny. It is said that it does not, because the prosecutor intended to part with the ownership of the coins,

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But the intention in the mind of the prosecutor cannot alter the nature of the crime. The question is really what was the intention of the prisoner when he took the coins; and there can be no doubt but that he intended to obtain them wrongfully. The point is concluded by the case of *Reg. v. Middleton* (28 L. T. Rep. N. S. 777; 12 Cox C. C. 417; L. Rep. 2 C. C. R. 38; 42 L. J. 73, M. C.). There must be a genuine contract in order to pass the property, and here there was never any contract. The prosecutor here never intended to contract for what he obtained. He also cited *Reg. v. Buckmaster* (57 L. T. Rep. N. S. 720; 16 Cox C. C. 339; 20 Q. B. Div. 182; 57 L. J. 25, M. C.).

LORD COLERIDGE, C.J.—This case is really upon consideration too clear for me to entertain any doubt about it. Of course one hesitates to let a man off if he is guilty of a gross fraud, and it is matter for regret to have to let off a man who is really guilty of something. But as long as we have to administer the law we must do so according to the law as it is. We are not here to make the law, and by the law of England, though it is enacted by 24 & 25 Vict. c. 96, s. 88, that a man indicted for false pretences shall not be acquitted if it be proved that he obtained the property with stealing which he is charged in any such manner as to amount in law to larceny. Unfortunately the statute stops there, and does not go on to say that if upon an indictment for larceny the offence committed is shown to be that of false pretences, the prisoner may be found guilty of the latter offence. The statute not having said it, and the one offence being a misdemeanour while the other is a felony, you cannot according to the ordinary principles of the common law convict for the misdemeanour where the prisoner is indicted for the felony. Now the law is plain that, where the property in an article is intended to be parted with, the offence cannot be that of larceny. Here it is quite clear that the prosecutor did intend to part with the property in the piece of coin, and the case is not like any of those cases in which the prosecutor clearly never intended to part with the property in the article alleged to have been stolen. Whether or not the prosecutor here intended to part with the property in the coin does not signify if what he did was in effect to part with it for something which he did not get. I have already said that you cannot convict of false pretences upon an indictment for larceny, and as the offence here was, if anything, that of false pretences, and the indictment was for larceny, it follows that this man must get off upon this indictment. I am therefore of opinion that this conviction must be quashed.

HAWKINS, J.—I cannot myself imagine a clearer illustration of the difference between the offence of false pretences and that of larceny than is afforded by this case. It is perfectly clear that the prosecutor intended to part with the property in the coins, and, that being so, the case is clearly not that of larceny. The conviction must therefore be quashed.

MATHEW, J.—This is a case of false pretences, if anything, and not of larceny; and I am of opinion therefore that the conviction must be quashed.

DAY, J.—I entirely concur with my Lord.

GRANTHAM, J.—I am of the same opinion.

Conviction quashed.

Solicitor for the prosecution, *The Solicitor for the Treasury.*

Solicitors for the defendant, *Olland and Millikins.*

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QUEEN'S BENCH DIVISION.

Wednesday, March 26, 1890.

(Before LORD COLERIDGE, C.J. and Lord ESHER, M.R.)

COTTERILL (app.) v. LEMPRIERE (resp.) (a).

Practice—Summary proceedings—Alternative offences alleged in same information—Validity of conviction.

A driver of a steam tramcar was prosecuted and convicted for having permitted smoke to escape from his engine "contrary to the bye-laws of the Board of Trade, made for the regulation of traffic on the said company's lines."

The bye-law in question provided that "no smoke or steam shall be emitted from the engines so as to constitute any reasonable ground of complaint to the passengers or the public" under a penalty.

Held, that the bye-law created offences in the alternative, and that, as the information and conviction did not set forth distinctly with which of these alternative offences the defendant was charged, the conviction was bad.

THIS was a case stated by justices for the county of Stafford under the statute 42 & 43 Vict. c. 49, s. 33.

The facts of the case were, so far as material, as follows:

An information was, on the 8th day of November, 1889, preferred by the respondent against the appellant for that the appellant, on the 5th day of November, 1889, at the parish of Handsworth, in the county of Stafford, he then being the driver of a certain engine attached to a tramcar, the property of the South Staffordshire and Birmingham

(a) Reported by ALFRED H. LEFROY, Esq., Barrister-at-Law.

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District Steam Tramway Company Limited, did then and there permit smoke to escape from his said engine contrary to the bye-laws of the Board of Trade made for the regulation of traffic on the said company's lines there situate.

On the above-mentioned date the appellant was driver of the engine of the tramcar in question in the Holyhead-road, in the parish of Handsworth, when smoke was emitted from his engine. The bye-law of the Board of Trade under which the proceedings were taken is as follows:

No smoke or steam shall be emitted from the engines so as to constitute any reasonable ground of complaint to the passengers or the public.

The penalty provided for such offence is one not exceeding 40s. A copy of the said bye-law is thereby directed to be placed in a conspicuous place inside each carriage in use on the tramways. The said information was objected to on behalf of the appellant on the ground that it did not allege that the smoke was emitted so as to constitute any reasonable ground of complaint to the passengers or public or to which of them, but the justices overruled the objection.

It was proved to the satisfaction of the justices by several witnesses that the emission of the smoke in question was offensive, and they considered that it formed a reasonable ground of complaint to the public.

On the part of the respondent it was contended that the information and conviction were respectively good in point of law, and that the offence with which the appellant was charged was completely disclosed and correctly set out, and that the appellant was in no way prejudiced or misled as to the nature of the offence with which he was charged.

The justices being of opinion that the appellant was not prejudiced or misled by the said information and summons as to the nature of the charge to be preferred against him; that the same were respectively good in point of law, and that the offence charged against the appellant was completely disclosed; and being also of opinion that the appellant was guilty of the offence charged against him, convicted him thereof.

The conviction, so far as material, was as follows:

Samuel Cotterill (hereinafter called the defendant) is this day convicted before this court for that he, on the 15th day of November, 1889, at the parish of Handsworth, in the county of Stafford, then being the driver of a certain engine attached to a tramcar, the property of the South Staffordshire and Birmingham District Steam Tramway Company Limited, did then and there permit smoke to escape from his said engine, contrary to the bye-laws of the Board of Trade made for the regulation of traffic on the said company's lines there situate, and contrary to the statute in such case made and provided, and it is adjudged that the defendant for his said offence do forfeit and pay the sum of twenty shillings, and do also pay to Frederick Lempriere, the prosecutor, the further sum of 14s. 6d. costs.

The question for the opinion of the court was whether, as it was not alleged by the said information and summons, and did not appear upon the said conviction, that the smoke was emitted so as to constitute any reasonable ground of complaint to the

passengers or the public, or which of them, the said information, summons, and conviction respectively disclosed an offence against the said Board of Trade bye-laws, for which the appellant might be so convicted, and were respectively right in point of law, or were erroneous.

McIntyre for the appellant.—‘The information and conviction are too vague, and do not disclose the offence with which the appellant is charged. They should have stated that the emission of smoke was such as to afford a reasonable ground of complaint to passengers or to the public, whichever may have been the case. The bye-law provides a penalty for alternative offences, and it has been frequently held that the particular offence must be specified for which the penalty is inflicted. The mention of the alternative offences is not sufficient: (*Rex v. North*, 6 Dowl. & Ryl. 143; *Rex v. Pain*, 7 Dowl. & Ryl. 678.) [Lord ESHER, M.R. referred to *Rex v. Sadler* (2 Chitty’s Rep. 519).]

Johnson Watson for the respondent.—The justices have found that the appellant was in no way prejudiced or misled by the form in which the information was laid. In these days the courts do not insist upon such strict compliance with form, unless it appears that someone has been prejudiced.

Lord COLERIDGE, C.J.—I yield to the objection taken in this case with reluctance, because I think, as Abbott, C.J. said in *Rex v. Pain* (7 Dowl. & Ryl. 678), that it is a nice and subtle one, and quite beside the merits. But we cannot overrule the authorities cited which are decisions of judges entitled to the greatest possible deference. It is true that the principles of construction upon which the courts act at the present time have been relaxed to a certain extent, yet, in the interests of justice, it is still necessary to see that statements in such proceedings as this are definite and specific. Further, where two constructions of what is in effect a penal statute are offered to us, it lies upon the person seeking to inflict the penalty to show that the construction which he asks us to adopt is the right one. Now in this case we have to deal with a bye-law which has to be construed in the same manner as an Act of Parliament. This bye-law provides that no smoke or steam shall be emitted from the engines, so as to constitute any reasonable ground of complaint to the passengers or the public, under a penalty. It is true that there may be many cases in which smoke may be emitted by engines, so as to constitute a ground of complaint, both to the passengers and the public; but it is also true that there may be cases in which the emission of smoke may constitute a ground of complaint to one only of these bodies of persons. The same penalty is, indeed, provided in both of these possible cases, but the courts have held, in a series of cases extending over a long period of time, that where an Act of Parliament creates offences in the alternative, and inflicts a penalty for the offences so created, the conviction and other proceedings must state for which of the offences the defendant has been proceeded against. The information in this

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case merely states that the defendant permitted smoke to escape from his engine contrary to the bye-laws, and the conviction proceeded in the same terms. Therefore in both documents the offence is stated in general terms, but on reading the bye-law itself we find that there are two alternative offences. It is contended that, owing to the offence being stated in these general terms, the conviction is bad. I think that even now, notwithstanding the broader principles of construction to which we have become accustomed, we should hold that this conviction should have been more specific. In the cases to which we have been referred—which appear to me to be undistinguishable from the present case—convictions not distinguishable in principle from this have been held bad on the same grounds as those contended for in the present instance. In *Rez v. Saddler* (2 Chitty's Rep. 519), decided in the time of Lord Mansfield—where the offence was the killing or attempting to kill fish, and one penalty was specified—a conviction, in which the offence was described in the language of the Act of Parliament, was quashed because it did not state of which offence the defendant had been found guilty. In 1825, the case of *Rez v. North* (6 Dowl. & Ryl. 143) was decided by judges of the very highest authority, and it was held that a conviction for selling "beer or ale" without a licence, for which offence the same penalty had been provided, was bad. That case was followed the next year by the case of *Rez v. Pain* (7 Dowl. & Ryl. 678) in which a conviction for having attached to a vessel casks "of the sort and description used or intended to be used for the smuggling of spirits," offences for which the same penalty was provided, was held bad on the same objection being taken. Lord Tenterden there says: "Now this Act of Parliament mentions three sets or descriptions of casks, which, if found on board or attached to a vessel, will render it liable to forfeiture . . . The conviction should have set forth under which of the three the casks in question fell." It is impossible to refuse to recognise such authorities as these; the conviction, therefore, must be quashed.

Lord ESHER, M.R.—This case must be decided upon that governing principle of the common law of England that those who charge one of the Queen's subjects with an offence for which a penalty is provided, must prove their charge clearly and in form. The prosecutor in this case was bound to prove, not only that the defendant had rendered himself liable to a penalty according to the facts, but also strictly according to law. Even if the cases which have been cited had never been decided, I should, nevertheless, think that the offence had not been strictly charged, and as it stood might have had an injurious effect upon the person accused. If the offence was that of constituting a reasonable ground of complaint to the passengers, it would have been necessary for the defendant to get passengers to support his case; if the offence was to the public the evidence of some of the public would have been necessary to him. It was therefore

important to him to know clearly with which offence he was charged. It is true that the same penalty is provided for both these offences, but in the information summons and conviction there is a defect apparent which might have caused a hardship to the party charged. The authorities cited are all strictly in point, and unless we could come to the conclusion that they were all wrongly decided, which we cannot do, we could not uphold this conviction.

Conviction quashed.

Solicitors for the appellant, *Smiles, Binyon, and Ollard*, agents for *Duignan and Elliot*, Walsall.

Solicitors for the respondent, *Charles Robinson and Co.*, agents for *James Clark*, Westbromwich.

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QUEEN'S BENCH DIVISION.

Monday, February 3, 1890.

(Before POLLOCK, B. and HAWKINS, J.)

FAIRCLOUGH v. ROBERTS. (a)

Licensing Acts—Sale by retail of beer to be consumed off the premises—Excise licence—Sale of beer otherwise than in casks or reputed quart bottles—Sufficiency of quantity sold at same time—Licensing Act, 1872 (35 & 36 Vict. c. 94), ss. 3 and 14—Inland Revenue Act, 1863 (26 & 27 Vict. c. 33), s. 1—Beerhouse Act, 1834 (4 & 5 Will. 4, c. 85), s. 19—6 Geo. 4, c. 81, s. 2.

The holder of an excise licence under 6 Geo. 4, c. 81, s. 2, may sell beer in casks containing not less than four-and-a-half gallons or in not less quantity than two dozen reputed quart bottles at one time.

A holder of a licence under this Act sold beer in pint and half-pint bottles, but the quantity so sold at one time was not less than that contained in a cask of four-and-a-half gallons or in two dozen reputed quart bottles. He was convicted under sect. 3 of the Licensing Act, 1872, of having sold beer by retail without a licence. On appeal.—

Held, that the quantity sold at one time was the test of a sale of beer by retail, and that therefore the conviction was wrong.

THIS was a case stated upon appeal against a conviction under the Licensing Act, 1872. At the instance of the respondent a summons under sect. 3 of the Licensing Act, 1872, was

(a) Reported by R. M. MINTON-SENHOUSE, Esq., Barrister-at-Law.

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quart bottles
—Quantity
sold sufficient
—4 & 5 Will.
4, c. 85, s. 19
—35 & 36
Vict. c. 94,
ss. 3 and 14.

issued against the appellant, charging him with having unlawfully sold by retail (viz., in less quantity than four-and-a-half gallons in cask or two dozen reputed quart bottles at one time, or in other manner than last aforesaid) beer to be consumed off the premises without having a certificate authorising him so to do.

At the hearing the magistrates found that the appellant was a grocer, and the holder of an excise licence under 6 Geo. 4, c. 81, s. 2, which authorised him to sell beer only in casks containing not less than four-and-a-half gallons imperial standard gallon measure, or in not less than two dozen reputed quart bottles at one time, to be drunk or consumed elsewhere than on his premises. It was proved that the appellant sold beer in other manner than that specified in 6 Geo. 4, c. 81, s. 2, viz., in bottles other than reputed quart bottles; but the quantities of beer thus sold at one time was not less than the amount which a cask of four-and-a-half gallons or two dozen reputed quart bottles would contain. It was also found that the appellant had not obtained the certificate under the Inland Revenue Act, 1863 (26 & 27 Vict. c. 33, s. 1), which authorises the holder of a licence under 6 Geo. 4, c. 81, s. 2, to take out an additional licence for the sale of beer in any less quantity and in any other manner than as specified in that Act.

On these findings the justices convicted the appellant, and the question for this court was whether the appellant was entitled to sell beer in half-pint bottles or reputed pint bottles so long as the total quantity so sold at one time was not less than the quantity that could be contained in a cask of not less than four-and-a-half gallons or in two dozen reputed quart bottles without obtaining a certificate from the justices authorising him to hold an additional licence to sell by retail beer to be consumed off the premises pursuant to 26 & 27 Vict. c. 33, s. 1.

Henn Collins, Q.C. (*Besley* and *J. W. Mansfield* with him) for the appellant.—Sect. 74 of the Licensing Act, 1872, defines what is meant by “sale of beer by retail.” That section provides that “sale by retail” means a sale in such quantities as is declared to be sale by retail by any Act relating to the sale of intoxicating liquors. By this the Court are referred back to sect. 19 of the Beer House Act, 1834 (4 & 5 Will. 4, c. 85), which enacts that every sale of beer, cider, or perry in any less quantity than four gallons and a half shall be deemed and taken to be a selling by retail. Thus it is clear that the quantity sold and not the size of the measure in which it may be sold, is the test of a sale by retail, and the only offence that can be committed by a person charged with selling beer by retail without a licence is the selling of less than the quantity fixed by statute. Sect. 1 of 26 & 27 Vict. c. 33, is enabling only. It was therefore unnecessary for appellant to take out an additional licence under that section.

Bryce Roberts for the respondent.—The conviction was right. The appellant is bound to have an additional licence under 26 & 27

Vict. c. 33, s. 1, for the language is explicit. It is not merely "in less quantity," but also "in any other manner." Therefore a licence under that section ought to have been obtained if the appellant wished to sell beer in any other manner than in quart bottles or casks.

POLLOCK, B.—It appears to me that it is impossible to sustain this conviction. In proceedings of this nature it is not sufficient to produce an inferential argument from one series of Acts to another series under which a man might be liable to be convicted. The question is, whether the actual conviction be right. The point raised in this case is not a matter of mere form. The prosecution did not intend merely to question the form of the licence, but to raise the question whether the appellant has committed a specific offence created by a specific Act of Parliament. That Act is the Licensing Act, 1872, by sect. 3 of which it is made an offence to sell by retail any intoxicating liquor without being duly licensed to sell the same; and the simple question for us is whether or not the appellant sold beer by retail. To discover the meaning of this phrase we must look at sect. 14 of the same Act, in which "sale by retail" is defined to mean the sale of intoxicating liquor in such quantities as is declared to be sale by retail in any Acts relating to the sale of intoxicating liquors. Now the only statute which has been referred to in argument as explaining the phrase "sale by retail" is 4 & 5 Will. 4, c. 85, which enacts, by sect. 19, that every sale of beer in any less quantity than four gallons and a half shall be deemed to be a sale by retail. In the case before us the quantity of beer sold by the appellant was considerably over the prescribed quantity of four-and-a-half gallons. His contract was for the sale at one time of a much larger quantity, and I do not think that such a sale brings him within the provisions of sect. 3 of the Act of 1872. There seems to me to be no possible doubt as to the proper construction of the section. It is unnecessary to go into any argument founded on the Act of 1825. Our decision seems not only properly to interpret the language of the Act, but also to be consonant with good reason, for it would be wrong to make that an offence which was not one when the Act was passed simply because it is now the fashion to sell beer in smaller bottles than was then the custom. I do not inquire whether the appellant has committed an offence under the Excise Acts, for it is only with the Licensing Act, 1872, that we have to deal.

HAWKINS, J.—I am of the same opinion.

Solicitor for the appellant, *H. O. Gosnell*.

Solicitors for the respondent, *Winter and Co.*

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4, c. 85, s. 19
—*35 & 36*
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ss. 3 and 14.

NORTH-EASTERN CIRCUIT.

LEEDS SUMMER ASSIZES.

Friday, August 1, 1890.

(Before CHARLES, J.)

REG. v. JACKSON. (a)

Attempt to murder—Attempt to discharge a loaded arm—Revolver loaded in some of its chambers—Chamber attempted to be discharged unloaded—Failure of attempt “from want of priming or from any other cause”—24 & 25 Vict. c. 100, ss. 14, 19.

A revolver which is loaded in some of its chambers, and which is capable of being discharged if the trigger is drawn a sufficient number of times, is a loaded arm within the meaning of 24 & 25 Vict. c. 100, s. 14, notwithstanding the fact that some of its chambers are not loaded, including the chamber upon which the hammer would fall upon the trigger being drawn in the usual way for the first time, and also notwithstanding the fact that such revolver is incapable of being discharged by merely drawing the trigger unless the trigger were to be drawn a sufficient number of times to cause the chambers to revolve and the hammer to fall upon a loaded chamber.

Upon an indictment for attempting to discharge a loaded arm with intent to murder, the evidence for the prosecution was that the prisoner had pointed at the prosecutor a revolver loaded in some of its chambers with ball cartridges, but not in others, saying that he would shoot him, and that he had pulled the trigger of the revolver, but that the hammer had fallen upon a chamber which contained an empty cartridge case.

Held, that the revolver was a loaded arm within the meaning of 24 & 25 Vict. c. 100, s. 14; and that the prisoner could upon the evidence be convicted of attempting to discharge a loaded arm with intent to murder the prosecutor.

THE prisoner was indicted under 24 & 25 Vict. c. 100, s. 14, for that he, on the 9th day of July, 1890, in the borough of Leeds, feloniously by drawing a trigger of certain loaded arms, to wit, a revolver, then loaded with three leaden bullets, did attempt to discharge the same at one William Rudd, with intent in so doing then and thereby feloniously, wilfully, and of his malice aforethought to kill and murder the said William Rudd.

It appeared that on the night of the 9th day of July, 1890, two

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

constables in the borough of Leeds, one of whom was William Rudd, had been called into the house of the prisoner's mother, and requested to turn the prisoner and a woman out of the house; that an altercation had ensued, in the course of which the prisoner had gone upstairs, saying, "stop while I fetch my pistol down." The police constables had then left the house, and while they were watching it from the opposite side of the road the prisoner had come out and gone across to them and pointed a revolver at them, saying that he would shoot them. The prosecutor had then heard a click of the trigger, as though the revolver had missed fire. Upon the prisoner being arrested shortly afterwards a revolver was found upon him; in the chamber upon which the hammer had last fallen was a discharged cartridge, the next three chambers containing ball cartridges, and the next two chambers containing two blank cartridges. Between the time of the click of the hammer being heard and the prisoner's arrest the revolver had not been discharged. The revolver, which was produced at the trial, was an ordinary six-chambered revolver, upon pulling the trigger of which the hammer was raised, while the chambers revolved until the chamber next to that which was opposite the barrel before the trigger was pulled came opposite to the barrel, at which moment the hammer would fall. If the trigger was pulled six times the hammer would be caused to fall successively upon each of the six chambers, and if any of the chambers contained a loaded cartridge, such cartridge, upon the hammer falling upon the chamber which contained it, would in all probability have exploded.

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murder—
Attempt to
discharge
loaded arm—
Revolver
partially
loaded—
Chamber
attempted to
be discharged
unloaded—
24 & 25 Vict.
c. 100, ss.
14, 19.

By sect. 14 of 24 & 25 Vict. c. 100, it is enacted (*inter alia*) that

Whosoever shall shoot at any person, or shall, by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person . . . with intent to commit murder, shall, whether "any bodily injury be effected or not, be guilty of felony." . . .

And by sect. 19 of the same Act it is enacted that

Any gun, pistol, or other arms, which shall be loaded in the barrel with gunpowder or any other explosive substance, and ball, shot, slug, or other destructive material, shall be deemed to be loaded arms within the meaning of this Act, although the attempt to discharge the same may fail from want of proper priming or from any other cause.

At the close of the case for the prosecution

B. G. Wilkinson submitted, on behalf of the prisoner, that as the trigger of the revolver had fallen upon an unloaded chamber, the weapon was not a loaded weapon within the meaning of 24 & 25 Vict. c. 100, s. 14.

H. S. Cautley, on behalf of the prosecution, submitted that it made no difference that the prisoner had only pulled the trigger once, since there were ball cartridges in some of the chambers which would have been exploded had the trigger been pulled often enough by the prisoner.

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Attempt to
discharge
loaded arm—
Revolver
partially
loaded—
Chamber
attempted to
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unloaded—
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14, 19.

CHARLES, J.—I see that sect. 19 of 24 & 25 Vict. c. 100, says that a pistol which shall be loaded with gunpowder and ball shall be deemed to be loaded arms within the meaning of the Act, although the attempt to discharge the same may fail from any other cause than that of want of proper priming; and in this case you say that the revolver was loaded because a barrel of it was loaded with a ball cartridge?

Cautley.—It is submitted that that is so. The old cases in which it was held that, in order to constitute the offence of attempting to discharge loaded firearms, the weapons must be so loaded as to be capable of doing the mischief intended were decided previously to 24 & 25 Vict. c. 100, s. 14, and are distinguishable on the ground that there the weapon could not have been fired at all by pulling the trigger. Whereas here, if the trigger had been pulled sufficiently, the weapon must have exploded.

CHARLES, J.—I am of opinion that the case should go to the jury. In summing up to the jury subsequently his Lordship said:—Gentlemen, in this case the first question is whether this revolver was a loaded weapon within the meaning of the section, there being in two of its chambers dummy cartridges, in three of its chambers live cartridges, and in one of them a spent cartridge. Now at the time the hammer descended on to the chamber it did descend in fact on the chamber in which there was a spent cartridge, and it could therefore do no mischief. It is submitted that such being the case the offence with which the prisoner is charged has not been made out. But it is my duty to tell you that in law a revolver loaded in the way this revolver was loaded, with ball cartridges in three of its chambers, is a loaded arm within the meaning of the section under which the prisoner is indicted. That, gentlemen, you must take from me as the law, and I have no doubt as to this being a loaded arm within the meaning of sect. 14, when I read the enactment contained in sect. 19 of the Act, which shows that sect. 14 was intended to apply where the attempt to discharge a loaded arm fails from any other cause than that of want of priming.

His Lordship then dealt with the evidence, and in the result the jury found a verdict of

Not guilty.

Solicitor for the prosecution *W. Ward*, Leeds.

COURT OF APPEAL.

Feb. 26 and 27.

(Before COTTON, LINDLEY, and LOPES, L.JJ.)

O'SHEA v. O'SHEA AND PARNELL; *Ex parte* TUOHY. (a)APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION
(DIVORCE).*Practice—Contempt of Court — Summary Process — Criminal matter—Appeal—Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 19, 47.**On an application to the Divorce Court T. was ordered to pay a fine as being guilty of a contempt of court in publishing in a certain newspaper comments upon the conduct of a party to a divorce suit pending in the High Court of Justice.**T. appealed.**Held, that the matter was a criminal one, and that, by virtue of sect. 47 of the Judicature Act, 1873, there was no right of appeal.**Reg. v. Barnardo (61 L. T. Rep. N. S. 547; 23 Q. B. Div. 305) distinguished.*

THIS was an action by Capt. W. H. O'Shea against his wife for dissolution of marriage on the ground of her misconduct with Mr. C. S. Parnell.

On the 4th day of January, 1890, an article was published in the *Freeman's Journal* commenting on the conduct of Captain W. H. O'Shea.

The *Freeman's Journal* was a newspaper published and registered in Dublin, but it also was published and had an office in London.

Captain O'Shea applied for a writ of attachment to issue against Tuohy, who was stated to be the manager of the London office, for contempt of court in publishing the article in question.

The notice of motion was entitled in the action of *O'Shea v. O'Shea and Parnell*, and also "in the matter of an application on behalf of W. H. O'Shea for a writ of attachment for contempt of court against J. Tuohy for printing and publishing a certain article in the *Freeman's Journal* newspaper on the 4th day of January, 1890, calculated to prejudice the petitioner in the eyes of the public, and to discredit him in the assertion of his right in this honourable court."

(a) Reported by A. J. SPENCER, Esq., Barrister-at-Law.

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The motion was heard on the 18th Feb. 1890, by Butt, J., who held that Tuohy was in charge of the *Freeman's Journal* in London, and responsible for the publication of the article, and ordered that a writ of attachment should issue against him unless he should pay a fine of 100*l.* within a fortnight, and also ordered that he should pay the costs of the application as between solicitor and client.

Tuohy appealed.

Sir Charles Russell, Q.C., Asquith, Q.C., and Roskill for Tuohy.—We only appeal on the question whether Tuohy is responsible for the publication of the *Freeman's Journal* in London. Persons connected with the paper in a subordinate capacity only will not be punished for matter published in the paper. There is, however, a preliminary question whether in such a case as this the Judicature Act, 1873, s. 47, does not prevent an appeal. This is not an appeal in a criminal matter, and we have therefore a right to appeal: *Reg. v. Barnardo* (61 L. T. Rep. N. S. 547; 23 Q. B. Div. 204); *Ex parte Alice Woodhall* (59 L. T. Rep. N. S. 841; 20 Q. B. Div. 832); *Re Johnson* (58 L. T. Rep. N. S. 160); 20 Q. B. Div. 68; *Reg. v. Jordan* (36 W. R. 707.) An appeal has been frequently heard in questions of attachment: *Re Bell Cox* (58 L. T. Rep. N. S. 323; 20 Q. B. Div. 1); *Hunt v. Clarke* (61 L. T. Rep. N. S. 343.)

Sir Edward Clarke (S.-G.), Inderwick, Q.C., Lewis Coward, and Oxley for Captain O'Shea.—It has never yet been decided whether or not there is a right of appeal in such a case as this. This is an attachment for contempt of court, not for disobedience to an order made in a suit. The order is made in exercise of the jurisdiction of the court to support its own authority. There is a difference between the two sorts of contempt of court, and contempt of this kind is clearly criminal. No privilege exists where an attachment is criminal: *Re Freston* (49 L. T. Rep. N. S. 290; 11 Q. B. Div. 545). Contempt of court is a criminal offence: *Re Pollard* (L. Rep. 2 P. C. 106). Contempt of court of this kind is an indictable misdemeanour: Hawkins' Pleas of the Crown, book 1, ch. 6; Russell on Crimes, 5th edit., vol 1, p. 188; *Earl of Thanet's case*, 27 State Trials, 822. There is also a supplementary power to attach by summary process. It has always been considered that interference with the process of the court is an indictable offence. Indictments have not been preferred because it has been usual for the court to deal with the matter under its summary jurisdiction. The case of *Ex parte Bell Cox* (*ubi sup.*) is under appeal to the House of Lords. In that case the attachment was not for doing something the not doing of which was not criminal. This application is not a step in a civil action at all; it is a matter outside the suit. It is not a proceeding between two litigants at all, but an appeal to the court to protect its own purity and administration. The Crown Office Rules, 1886, rr. 261, 272, treat contempt of court as a criminal matter.

Asquith, Q.C. in reply.—There is no instance of proceeding by way of indictment for a contempt of court. Contempt cannot be the subject of an independent proceeding in any other court. The application for attachment for contempt is clearly a proceeding in a civil cause, and does not come within the 47th section of the Judicature Act, 1873. It is a private injury to the petitioner in this case. *Re Freston* (*ubi sup.*) is in my favour, as an appeal was there allowed; so also in *Re Johnson* (*ubi sup.*).

Sir *Edward Clarke* (S.-G.) referred to *Skipworth's case* (28 L. T. Rep. N. S. 227; L. Rep. 9 Q. B. 230).

Corron, L.J.—The question raised in this case has, I believe, never yet been decided, but it has been fully argued before us, and I think we ought not to delay giving judgment. The appeal is from an order of Butt, J., inflicting a fine of 100*l.* on the appellant. The objection is taken, that there can be no appeal because it is precluded by sect. 47 of the Judicature Act, 1873, which says: "No appeal shall lie from any judgment of the said High Court in any criminal cause or matter save from some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said judges under the said Act of the 11th and 12th years of Her Majesty's reign." Is this a proceeding in a criminal cause or matter? I think it is. It is true that cases very like this have been dealt with in the Court of Appeal, but no objection as to the right of appeal was raised in those cases, although in one case, *Reg. v. Jordan* (*ubi sup.*), a doubt was suggested after the case had been decided whether an appeal would lie. This proceeding is for what is called a contempt of court. Of course there are many contempts of court which have nothing criminal about them; for instance, where a man disobeys an order made against him in a civil proceeding—as where an injunction is granted in an action against a defendant which he disobeys, and there is a motion to commit. That is merely a way of carrying out the order of the court, and the motion is only to obtain something being done or not done in the course of the action. No doubt the motion here is entitled in the divorce action, but it is also headed in the matter of the person against whom the application is made. It is convenient it should be headed in the cause, but the essential part of the title is in the "matter of an application of behalf of W. H. O'Shea for a writ of attachment for contempt of court," &c. The appellant is said to have done something which was contrary to the true course of justice, and that is clearly a contempt of a criminal nature. The Solicitor-General has quoted authorities to show that an attempt to pervert the true course of justice is a criminal offence. It is argued that the plaintiff in the action brings the matter forward here because he suffers a particular injury; but it is conceded that it is a wrongful act, because there could be no fine or imprisonment except on the ground that it is a wrongful act. Therefore, though the plaintiff proceeds by an application headed in

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the divorce action, it is not really a proceeding in the action, but it is an application to punish an attempt to pervert the true course of justice, which is a criminal offence just as an attack against the judge personally would be. It is true that in some cases it has been held that an application to commit does not come within sect. 47 of the Judicature Act, 1873, as for instance in *Reg. v. Barnardo (ubi sup.)*. Some stress is laid upon what I said in that case. My words were: "Sect. 47 does not mean that no appeal shall lie when the act which originates the proceeding in which the order was made is a crime, but it means that no appeal shall lie when the cause or matter in which the order was made is in the nature of a criminal proceeding." In that case the application was to obtain something being done in a civil proceeding before the Queen's Bench Division. That is what I referred to. Here the object is not to obtain something being done in a civil proceeding for the benefit of the plaintiff, but to punish the appellant for a wrong. The object is to enable the action to be heard without prejudice, and to obtain the fair trial to which every suitor has a right. I think, therefore, that the Act of Parliament prevents us from entertaining this appeal.

LINDLEY, L.J.—The question in this case turns upon two sections of the Judicature Act, 1873. Sect. 19 says: "The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as herein-after mentioned, of Her Majesty's High Court of Justice or of any judges or judge thereof." Then sect. 47 contains these words: "No appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save from some error of law apparent upon the record." Does this case come within sect. 47? I think it does. I look upon this as an appeal by Tuohy from a summary punishment for a criminal offence. It is clear that his offence is a criminal offence. I do not say that it is an indictable offence; but whether indictable or not, it is the one instance, so far as I know, in which by common law a criminal offence is punishable summarily. There is no case which has been cited to us which is contrary to our present decision, though in some cases the court has entertained such an appeal when the point was not raised. In *Reg. v. Jordan (ubi sup.)* I had great doubts if there was jurisdiction to hear the appeal, and I so expressed myself after the appeal had been heard. *Reg. v. Barnardo (ubi sup.)* is distinguishable from the present case, and I think the court was quite right there. It is obvious that there are contempts and contempts, and some contempts have not been regarded as criminal. For instance, in my recollection the only way of enforcing payment in a Chancery proceeding was by an attachment. We must not therefore be misled by the word "contempt" or "attachment." In this case the proceeding is a summary conviction for a criminal offence, and no appeal therefore lies.

LOPES, L.J.—The question before us is one of very great importance. It is whether this is a “criminal cause or matter” within the meaning of sect. 47 of the Judicature Act, 1873. There are different kinds of attachment for contempt. There may be an attachment for not doing a thing in a civil proceeding, the not doing of which is not criminal. An instance of that kind of attachment is found in *Reg. v. Barnardo* (*ubi sup.*). Then there may be an attachment for doing something which is itself criminal, and is outside the suit. Such an offence is, in my opinion, a “criminal matter,” and comes within sect. 42 of the Judicature Act, 1873. In this case the act was done by a stranger to the action, and was an attempt to interfere with the administration of justice outside the action. The proceeding commenced with the motion against Tuohy and ended with his punishment. I am clearly of opinion that the order was made in a criminal matter. Whether the offence was indictable or not I express no opinion.

Solicitors for the appellant, *Lewis and Lewis*.

Solicitors for the respondent, *Wontner and Son*.

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CROWN CASES RESERVED.

May 10, 12, and June 21, 1890.

(Before Lord COLERIDGE, C.J., HAWKINS, DAY, WILLS, and GRANTHAM, JJ.)

REG. v. PAUL. (a).

Practice—Indictment under Criminal Law Amendment Act, 1885, for attempting to defile girl under thirteen, and under 24 & 25 Vict. c. 100, for an indecent assault—Conviction for indecent assault—Admissibility of unsworn testimony of girl to support conviction—24 & 25 Vict. c. 100, s. 52—48 & 49 Vict. c. 69, ss. 4, 9.

Upon the trial of an indictment, the first count of which charged the defendant, under sect. 4 of the Criminal Law Amendment Act, 1885, with attempting to have unlawful carnal knowledge of a girl under the age of thirteen years; and the second count of which charged him, under 24 & 25 Vict. c. 100, s. 52, with an indecent assault on the girl, her evidence was admitted in

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

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support of both charges, although it had not been given upon oath. The jury having been directed that there was not sufficient evidence to support the charge contained in the first count of the indictment, acquitted the defendant upon such charge, but convicted him of the indecent assault charged in the second count. In order to support the conviction for the indecent assault, the evidence was insufficient unless the evidence which had been given by the girl was admissible.

Held, that the proceedings upon each count of the indictment were as separate and distinct as if such counts had been contained in separate indictments, the one charging the defendant with the attempt under the Criminal Law Amendment Act, 1885, the other charging him with the indecent assault under 24 & 25 Vict. c. 100, s. 52; and that, as the first-mentioned Act only rendered the unsworn evidence of the girl admissible in support of the first count of the indictment, it was inadmissible in support of the second count, and the conviction could not therefore be sustained.

Reg. v. Wealand (58 L. T. Rep. N. S. 782; 16 Cox C. C. 402; 20 Q. B. Div. 827; 57 L. J. 44, M. C.) distinguished.

CASE reserved for the opinion of the Court by Sir Thomas Chambers, Q.C., Recorder of London, as follows:

The prisoner was tried before me at the sessions of the Central Criminal Court held on the 3rd day of February, 1890, upon an indictment charging him in the first count, under sect. 4 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), with unlawfully attempting to have unlawful carnal knowledge of Frances Coles, a girl under the age of thirteen years, and in the second count, under 24 & 25 Vict. c. 100, with an indecent assault on the said Frances Coles, then being a young person under the age of thirteen years.

The evidence of Frances Coles was received, though not given upon oath under the provision in sect. 4 of the said Criminal Law Amendment Act.

At the close of the case for the prosecution, I held that there was no evidence of an attempt to have carnal knowledge, but that the evidence of the girl as to an indecent assault was corroborated by other material evidence implicating the prisoner.

Without the girl's evidence, the evidence as to an indecent assault would have been insufficient to justify a conviction.

The counsel for the defence then submitted that as the only charge remaining was the charge of indecent assault, and as there was nothing in the Criminal Law Amendment Act, 1885, to make the evidence of the girl admissible without oath upon a charge of indecent assault, there was no evidence to go to the jury upon that charge.

I decided to leave the case to the jury upon the evidence of the girl, as well as the evidence of the other witnesses, and they

acquitted the prisoner on the first count, but found him guilty, on the second count, of an indecent assault.

I reserved the question of the admissibility of the evidence, and respited the judgment, and released the prisoner on his own recognisances, until the Court for Crown Cases Reserved shall have decided this case.

The question reserved for the opinion of the court was whether the conviction could, under the circumstances, be supported.

By sect. 4 of the Criminal Law Amendment Act, 1880 (48 & 49 Vict. c. 69), it is enacted that

Any person who attempts to have unlawful carnal knowledge of any girl under the age of thirteen years shall be guilty of a misdemeanour. . . . Where upon the hearing of a charge under this section, the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the court or justices, understand the nature of an oath, the evidence of such girl, or other child of tender years, may be received, though not given upon oath, if, in the opinion of the court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth: Provided that no person shall be liable to be convicted of the offence unless the testimony admitted by virtue of this section, and given on behalf of the prosecution shall be corroborated by some other material evidence in support thereof implicating the accused.

By sect. 9 of the same Act it is enacted that

If upon the trial of any indictment for rape, or any offence made felony by section four of this Act, the jury shall be satisfied that the defendant is guilty of an offence under sections three, four, or five of this Act, or of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in such indictment, or of an attempt to commit the same, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of such offence as aforesaid, or of an indecent assault.

Elliott, for the prisoner, submitted that the question in the present case was distinguishable from that in *Reg. v. Wealand* (58 L. T. Rep. N. S. 782; 16 Cox C. C. 402; 20 Q. B. Div. 827; 57 L. J. 44, M.C.) because in that case the prisoner was indicted for the felony. while here he was only indicted for the misdemeanour. It was therefore in *Reg. v. Wealand* competent to the jury to find him guilty under sect. 9 of the Criminal Law Amendment Act, 1885, which applies to felonies under sect. 4 of the Act and not to misdemeanours. Here the count for the attempt having failed, all that was left was the count for indecent assault, upon which the unsworn testimony of the child was inadmissible. The evidence, although admissible upon the first count, was not by its admission made evidence upon the whole indictment, inasmuch as the charge in the first count was as distinct from the charge in the second count as if they had been contained in separate indictments. In *Reg. v. Wealand* the jury were enabled by the statute to convict upon the same indictment for the indecent assault, which they were not enabled to do here.

C. F. Gill, for the prosecution, contended that the girl's evidence was admissible in support of the attempt to have carnal knowledge, and had the Recorder not stopped the case on the

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first count, the jury would have been entitled to have convicted the prisoner of the lesser offence, according to *Reg. v. Wealand*; for sect. 9 of the Act expressly refers to the jury not being satisfied that the defendant is guilty of an attempt to commit the offence. The jury, therefore being entitled to find the prisoner guilty of the lesser offence on the first count, in support of which the unsworn evidence was clearly admissible, their verdict must be taken to be supported by such evidence, and the conviction was therefore right.

Our. adv. vult.

June 21.—HAWKINS, J. read the following judgment.—I am of opinion that the conviction in this case cannot be supported. The indictment in the first count charged the prisoner (under sect. 4 of the Criminal Law Amendment Act, 1885, 48 & 49 Vict. c. 69) with a misdemeanour in having attempted to have carnal knowledge of a girl under the age of thirteen years, and in the second count (under the 52nd section of the Offences against the Person Act, 1861, 24 & 25 Vict. c. 100) with an indecent assault upon the same girl. The case was tried before the Recorder of London, at the Central Criminal Court. The girl being of tender years, and not understanding the nature of an oath, her unsworn evidence was received, under the provisions contained in sect. 4 of the first-mentioned Act. At the close of the case for the prosecution, the Recorder held that there was no evidence of the attempt charged in the first count; as to that count, therefore, the prisoner was at the close of the summing-up acquitted by the jury. As to the second count, the case states that, although the girl's statement was corroborated, as required by sect. 4, by other material evidence implicating the prisoner, still such corroborative evidence without that of the girl was insufficient to justify a conviction. Objection was duly taken by the learned counsel for the prisoner that the evidence of the girl without oath was altogether inadmissible upon the second count, and ought, therefore, so far as it related to that count, to be excluded from the consideration of the jury. The Recorder, however, decided otherwise, and directed the jury that, in considering the second count, they might have regard to the whole of the evidence before them, the unsworn as well as the sworn, and with that direction the jury found the prisoner guilty of an indecent assault. Notwithstanding a passage to be found in 1 Hale P. C. 684, and which I shall cite hereafter, I do not suppose any one would, before the passing of the Criminal Law Amendment Act, 1885, have ventured to suggest that the unsworn statement of the girl could have been received in support of any part of the indictment, no matter how strongly it might have been corroborated by other unobjectionable evidence. The Criminal Law Amendment Act, 1885, was passed with a view, among other things, to afford greater protection to young female children of tender years, who were often, when alone or in the companionship merely of other children of their own age,

made the victims of wickedly lustful men, who desired carnal knowledge of their bodies, and who, by reason of the inability of such children to understand the nature of an oath, were frequently enabled to carry out their criminal desires with impunity. With a view to remedy this unsatisfactory state of things, it was by the 4th section of the Act enacted that "any person who unlawfully and carnally knows any girl under the age of thirteen years shall be guilty of felony," and "any person who attempts to have unlawful carnal knowledge of any girl under the age of thirteen years shall be guilty of a misdemeanour." Later on in the same section occurs that enactment which has given rise to the question now before us, and which is in these terms: "Where upon the hearing of a charge under this section the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the court or justices, understand the nature of an oath, the evidence of such girl, or other child of tender years, may be received, though not given upon oath, if, in the opinion of the court or justices, as the case may be, such girl, or other child of tender years, is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth." Then follows a proviso requiring corroborative evidence implicating the accused. Although it does not directly affect the matter we have to decide, it may be interesting to note that the idea of admitting the evidence of an intelligent child of tender years without oath is not new. In Hale's Pleas of the Crown, vol. i., p. 634, dealing with the testimony of children in charges of rape, occurs this passage: "It seems to me that if it appear to the court that she hath that sense and understanding that she knows and considers the obligation of an oath, though she be under twelve years, she may be sworn; thus we find it done in cases of evidences against witches, an infant of nine years old was sworn: (Dalt, cap. iii. p. 297, *k*.) But if it be an infant of such tender years that in point of discretion the court sees it unfit to swear her, yet I think she ought to be heard without oath to give the court information, though singly of itself it ought not to move the jury to convict the offender. Nor is it in itself a sufficient testimony, because not upon oath, without concurrence of other proofs, that may render the thing probable; and my reasons are: First, the nature of the offence, which is most times secret, and no other testimony can be had of the very doing of the fact, but the party upon whom it is committed, though there may be other concurrent proofs of the facts when it is done. Secondly, because if the child complains presently of the wrong done to her to the mother or other relations, their evidence upon oath shall be taken, yet it is but a narrative of what the child told them without oath, and there is much more reason for the court to hear the relation of the child herself, than to receive it at second hand from those that swear they heard her say so; for such a

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relation may be falsified or otherwise represented at the second hand than when it was first delivered. But in both these cases, whether the infant be sworn or no, it is necessary, to render their evidence credible, that there should be concurrent evidence to make out the fact, and not to ground a conviction singly upon such an accusation with or without oath of an infant. For in many cases there may be reason to admit such witnesses to be heard, in cases especially of this nature, which yet the jury is not bound to believe; for the excellency of the trial by jury is in that they are the triers of the credit of the witnesses as well as the truth of the fact; it is one thing, whether a witness be admissible to be heard, another thing, whether they are to be believed when heard." Notwithstanding this passage, it must, I think, be taken that before the passing of the Criminal Law Amendment Act, 1885, whatever may have been done in some particular cases, no testimony whatever could on a criminal trial be received except upon oath, and that the testimony of an infant not competent to take an oath could not be accepted at all: (see *Reg v. Braiser*, 1 Leach C. L. 199; 1 East P. C. c. 10, s. 5, and *Reg v. Powell*, 1 Leach C. L. 110. See also Best's Law of Evidence, 5th edit., 215, 223, and Taylor on Evidence, 6th edit., vol. ii., p. 1194, where the subject is more fully discussed). The exception to this general rule, relied on in support of this conviction, depends, therefore, absolutely and entirely upon the true interpretation of the language of the 4th section of the statute, beyond which we cannot look. Now, that section renders the evidence admissible only upon the hearing of a charge under that section, and the only charges to which that section relates, are having, or attempting to have, carnal knowledge of a girl under thirteen years of age. The crimes of rape and indecent assault are not even referred to in the section from beginning to end. Why the exception allowing unsworn evidence was not extended to the offences of rape and indecent assault, to the latter of which little children are perhaps even more often subjected than any other, I do not pretend to say. It may have been an oversight; it may have been intentional. I only know the exception is not in fact extended to either of such offences, and we must construe the Act as we find it. It was suggested, however, that inasmuch as the first count of the indictment was in respect of a charge, upon the hearing of which the unsworn testimony of the girl was admissible, and as such unsworn testimony was received upon that charge, it became legal evidence upon the whole indictment, although had the second count stood alone it would have been clearly inadmissible. I confess I am startled by this proposition. *Reg. v. Wealand* (*ubi sup.*) is said to be an authority in favour of that view. To this I cannot assent, and I propose presently to point out the difference between that case and the present, which renders it no authority at all upon the question we have to decide. Before doing so, however, I desire to offer one or two other observations in support of the view I take. In the first place, I

must note that this indictment is one for misdemeanour, and I do not imagine it will be disputed that several distinct and different misdemeanours may be charged in as many different counts of the same indictment, and when so charged they should, in my judgment, be treated as though they had been made the subject of so many different and distinct indictments: (See per Blackburn, J. in *Latham v. Ray*, 33 L. J. 199, M. C.; 5 B. & S. 635, and *Reg. v. Campbell*, 1 Q. B. 781. See also Taylor on Evidence, 6th edit., s. 308, pp. 346-7.) Thus treating them, it seems to me to follow that no evidence which is not admissible upon the particular count under investigation can be used in support of it simply because such evidence is admissible upon another charge, the subject of another count in the same indictment, any more than it would have been had the count under consideration formed the subject of a separate indictment. If it were otherwise, it would practically be in the power of a prosecutor to alter the law of evidence at his pleasure, by including several misdemeanours in one indictment, instead of preferring several indictments, and so making every piece of evidence, though only strictly admissible upon one count, evidence upon the whole indictment. Let me illustrate this by supposing the case of the trial of an indictment for false pretences charging in several counts as many distinct and different offences. On one of those counts the deposition of a sick witness unable to travel, taken (under 11 & 12 Vict. c. 42, s. 17) in the presence of the prisoner upon the charge contained in that count, would be clearly admissible upon that specific charge; but it would as clearly not be admissible upon the other distinctly different charges, respecting which it was not so taken: (see *Reg. v. Leadbetter*, 3 C. & K. 108.) Another illustration may be found by supposing an indictment containing three counts for separate and distinct larcenies, under sect. 5 of 24 & 25 Vict. c. 96. Could it be contended that the deposition of a sick witness taken on one charge of stealing would be evidence upon the other charges, simply because they were included in the same indictment? Take, again, the case of a prisoner charged with an offence under the Criminal Law Amendment Act, 1885, who by sect. 20 is made a competent witness on such charge. Could he, if the indictment against him contained counts for an indecent and also for a common assault, insist upon giving evidence as to common assault, though such testimony would be inadmissible if the counts were, as they might be, separately tried? Take, again, this very case. Suppose a count for either an indecent or a common assault committed on a different day to have been added to the present indictment. Could the girl's unsworn testimony have been used to prove that count? *Reg. v. Owen* (58 L. T. Rep. N. S. 780; 16 Cox C. C. 397; 20 Q. B. Div. 829; 57 L. J. 46, M. C.) in no degree militates against this view. There the prisoner was tried on an indictment containing two counts, one for an indecent, the other for a common assault, and he gave evidence in his own defence. In his evidence he

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admitted a common assault, but denied an indecent one. Of the latter he was acquitted, of the former he was found guilty. On a case reserved, it was objected that the admission of the prisoner in his evidence of the common assault was not admissible, because he could not be a witness for himself on such a charge. But it was held that the objection had no substance, because it was in the option of the prisoner to be examined as a witness, and if, electing to be sworn, he voluntarily chose to give evidence, or to make a statement not only as to the count on which his evidence was admissible, but also as to one upon which he was not compelled to say anything, his statement was properly receivable against himself, not by reason of the statute, but as an admission. That decision was clearly right; but I observe that the Lord Chief Justice, in delivering the judgment of the court, said: "The direction of the jury would perhaps have been more complete if the learned chairman had told them that the prisoner was only an admissible witness to the indecent assault, and had no right to give evidence on the question as to the common assault, which they must determine without reference to his testimony." No such direction was given to the jury in the present case, but they were led to treat the evidence objected to as admissible upon the whole indictment, which, in my opinion, was wrong. Perhaps I may venture to suggest one test, which seems to me to be crucial. Suppose the girl to have negatived any attempt to have carnal knowledge of her person, and the counsel for the prosecution then to have directed attention to, and proceeded to examine her pointedly respecting, the indecent assault. Would he, after objection, have been permitted so to do? If to this question the answer is "No," as I conceive it must be, it is, to my mind, conclusive in favour of the objection now raised for the prisoner. Direct authority upon the subject can hardly be looked for; but in Taylor on Evidence, 6th edit., sect. 754, p. 733, the rule, as I understand it, is clearly stated, viz., that whatever issues are joined upon any counts or pleas are to be tried by the jury distinctly from each other; citing, among other authorities, *Gould v. Oliver* (2 M. & G. 234, per Tindall, C.J.). It is true that sect. 754 has reference to civil causes, but possibly even greater strictness prevails in criminal cases: (see also sect. 326, p. 807.) The case of *Reg. v. Fridge* (9 L. T. Rep. N. S. 777; 9 Cox C. C. 430; 33 L. J. 74, M. C.) was referred to by the prisoner's counsel in the course of the argument; but I do not think it materially assists the elucidation of the question now raised. If the case of the prosecution is put upon the ground that if evidence which is admissible is given upon any one count, it is admissible upon the whole indictment, even though it contains forty counts, that is a fallacy and untenable. It is no more admissible than it is inadmissible upon the whole indictment. Why, I ask, is it more reasonable or logical, or in accordance with justice, to say that, being admissible in one count out of forty, it is admissible upon the

remaining thirty-nine counts upon which it would otherwise be inadmissible, than it would be to say that, because it is inadmissible upon thirty-nine counts, it is therefore inadmissible on the one count on which it would otherwise be admissible? Justice would seem to be rather in favour of rejecting the evidence altogether because it is not admissible on every count, for to admit it is calculated greatly to prejudice the jury against the prisoner, it being difficult for them, even with the most careful summing up of the judge, to dismiss from their mind evidence once before them for any purpose. The truth is that neither proposition is tenable. The true solution is that upon the one count it is admissible because the statute has made it so. Upon the other count it is inadmissible because the statute has left it as it was, viz., inadmissible; and as to any prejudice created by its reception on the one count, the judge ought to do his best to counteract such prejudice by telling the jury to ignore the evidence as far as possible in considering those counts on which it is inadmissible. I now proceed to discuss *Reg. v. Wealand*, and to point out the clear distinction between that case and the present. In that case the prisoner was indicted in one count simply for the felony of carnally knowing a girl under thirteen. The evidence of the girl, though not on oath, was received under sect. 4, and upon that charge it was clearly admissible within the express language of the statute. The jury found the prisoner not guilty of the felony, but, being satisfied that he was guilty of an indecent assault, they, under the express provision contained in sect. 9 of the Act, found him guilty of such assault; but for this section they would have been bound to acquit him altogether. Now, in that case, no objection could have been made to the unsworn testimony, for the 4th section expressly made it admissible upon the only count which the jury had to dispose of; and in authorising the jury under that count to convict of an indecent assault, though no indecent assault was charged, the Legislature must be taken to have intended them in the consideration of their verdict to deal with all the evidence before them, forgetting that the exception to the general rule of evidence was not made to extend to charges other than those in sect. 4. I was a party to the judgment, and agree in all the observations of the Lord Chief Justice in delivering it, and I venture to think they are rather in favour of than against my view of this case. In the present case, upon the first count no doubt the evidence was admissible, but upon that count the jury had no power to convict of an indecent assault; while upon the second count, which was for an indecent assault simply, the evidence was inadmissible. It is strangely anomalous to suppose that a person, being acquitted upon a charge on which unsworn evidence was admissible, should nevertheless be lawfully convicted on such evidence upon a count on which it was wholly inadmissible. To my mind, such a proposition is contrary to reason, good sense, and law. I note particu-

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larly an observation in the judgment of the Lord Chief Justice in *Reg. v. Wealand*, that the anomaly therein pointed out “may lead to a prisoner being indicted for the graver offence under sect. 4 when it is known that he can only be convicted of a less offence under sect. 9, on unsworn testimony given in support of the charge under sect. 4.” On this I can only say that, should such a course be adopted, I should look upon it as a scandalous abuse of the law with a view to convict the accused of a grave offence upon evidence known to be inadmissible if the indictment were confined to an honest statement of the real charge. I agree that the law created by the statute is in a very unsatisfactory state, and requires much amendment; but upon the point raised in this case I entertain no doubt that the conviction cannot be sustained, and ought to be quashed.

Conviction quashed.

Solicitor for the prosecution, *The Solicitor to the Treasury*.
Solicitor for the prisoner, *W. Edwin*.

CROWN CASES RESERVED.

May 10, 12, and June 21, 1890.

(Before Lord COLERIDGE, C.J., HAWKINS, DAY, WILLS, and GRANTHAM, JJ.)

REG. v. RIPLEY and REG. v. CAMPION. (a)

Practice—Corrupt practices — Prosecution by public prosecutor — Order of election court for trial before another court — Jurisdiction of court to try offence committed in another county — Venue in margin of indictment different from venue in body of indictment—Order for prosecution for a “corrupt practice”—Indictment for a number of corrupt practices — Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), s. 28.

Upon the trial, pursuant to the Municipal Corporations Act, 1882, of a petition against a municipal election, the court before whom the trial takes place have no power to make an order for the trial, in a county other than that in which the borough is situate, of a charge of bribery alleged to have been committed in such borough

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

during the election. An order of an election court for the prosecution of any person for a "corrupt practice" without further specifying the particular offence or offences for which the prosecution is authorised is not bad for want of particularity.

Where such an order has been made it is not essential for the validity of an indictment founded upon it that facts sufficient to establish the jurisdiction of the court to try an offence alleged to have been committed in another jurisdiction should be stated in the indictment.

The Municipal Elections (Corrupt and Illegal Practices) Act, 1884, by including a number of corrupt acts in the expression "a corrupt practice" enables prosecutions for all or any of the acts included in such expression, and therefore an order of an election court which directs a prosecution for "a corrupt practice" must be interpreted as being intended to authorise a prosecution for some of the corrupt acts included by the Act in such expression, and an indictment which charges any number of such corrupt acts is sufficiently justified by such an order.

At the trial of a petition against a municipal election for the borough of Nottingham before a commissioner appointed pursuant to the *Municipal Corporations Act, 1882*, an order was made by such commissioner under sect. 28 of the *Municipal Corporations (Corrupt and Illegal Practices) Act, 1884*, for the trial of certain persons at the assizes at Derby for "a corrupt practice." An indictment which contained a number of counts, each of which alleged a separate and distinct corrupt practice, having been found by the grand jury at Derby against each of the defendants, and he having pleaded guilty to such indictment, subject to certain questions raised at the trial.

Held, upon a case reserved for this court, that the election court had jurisdiction to make the order authorising the prosecution; that the order was sufficient without describing the nature of the corrupt practice in respect of which the prosecution was directed; that it was not necessary, in order to confer upon the court at Derby jurisdiction to try the case, that the indictment should have been found by a Nottingham grand jury and then remitted to Derby for trial, nor that the indictment should have stated on the face of it the facts which conferred jurisdiction to indict and try in Derbyshire an offence committed in Nottingham; and that the prosecution in Derbyshire of several distinct acts of bribery was sufficiently warranted by the order, although such order merely referred to a "corrupt practice."

CASE stated by Hawkins, J. as follows :

These defendants were tried before me on separate indictments at the last Derby Assizes for bribery alleged to have been committed at Nottingham during a municipal election for the borough of Nottingham in November, 1889.

Each defendant pleaded guilty subject to the opinion of the

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Court for Crown Cases Reserved upon the questions hereinafter stated.

On the trial of an election petition arising out of the said election before H. R. Mansel Jones, Esq., a barrister, duly appointed for the trial of municipal election petitions pursuant to the Municipal Corporations Act, 1882, orders were made by him for the trial at the Derby Assizes of each of the defendants for a corrupt practice.

A copy of the order so made in Riley's case is hereunto annexed. (a)

A copy of the indictment against Riley is also annexed. (b)

(a) The order was in the following terms: The Municipal Corporations Act, 1882 and the Municipal Elections (Corrupt and Illegal Practices) Act, 1884.—At a court holden on the 3rd day of March, 1890, at the Guildhall, Nottingham, for the trial of a municipal election petition for the Trent Ward of the borough of Nottingham, before H. R. Mansel Jones, Esquire, one of the barristers appointed for the trial of municipal election petitions pursuant to the Municipal Corporations Act 1882. Whereas Samuel Riley has this day been prosecuted before me for a corrupt practice. And whereas I think it in the interests of justice expedient that the said Samuel Riley should be tried before some other court. And whereas I am of opinion that the evidence is sufficient to put the said Samuel Riley upon his trial for the said offence. I do therefore order the said Samuel Riley to be prosecuted on indictment for the said offence before the justices of oyer and terminer, and gaol delivery to be holden at Derby in and for the county of Derby, and I do hereby commit the said Samuel Riley to take his trial at the said sessions of oyer and terminer and gaol delivery to be holden at Derby in and for the said county of Derby. I do therefore command the constables and all other peace officers of the said town of Nottingham forthwith safely to convey the said Samuel Riley to Her Majesty's prison for the said town of Nottingham, and deliver the said Samuel Riley to the keeper thereof, together with this warrant, and I do also in like manner command you, the said keeper of the said prison, to receive the said Samuel Riley there in safe and secure custody to detain and keep until the next sessions aforesaid to be holden in and for the said county of Derby, to answer the premises, or until the said Samuel Riley shall be from thence sooner discharged by the due course of law. Herein fail not, respectively, at your peril.—As witness my hand this 3rd day of March, 1890.—(Signed) H. R. MANSEL JONES.

(b) The indictment in the case of Riley was in the following form, and the indictment against Campion was similar to it:—

Derbyshire to wit.—The jurors for our Lady the Queen upon their oath present:

First count. That before and at the time of a certain election had and held on the first day of November in the year of our Lord one thousand eight hundred and eighty-nine, in the town and county of the town of Nottingham for the electing and choosing of a town councillor for the Trent Ward of the said town and county of the town to serve on the town council of the said town and county of the town of Nottingham aforesaid, and before and at the time of the committing of the several corrupt practices and offences hereinafter mentioned, William Nicholls was a candidate to be elected and returned at the said election as a town councillor to serve on the town council of the said town and county of the town of Nottingham for the said Trent Ward, and that Samuel Riley unlawfully and corruptly was guilty of bribery at the said election, against the form of the statute in that case made and provided, and against the peace of our Sovereign Lady the Queen, her Crown and dignity.

Second count. And the said jurors for our Lady the Queen upon their oath further present that at the said election in the first count of this indictment mentioned, to wit, on the 1st day of November in the year of our Lord one thousand eight hundred and eighty-nine, the said Samuel Riley unlawfully and corruptly did give and cause to be given to one John Whyler certain money, to wit, the sum of one shilling, in order to induce the said John Whyler, being a voter for the said Trent Ward in the first count of this indictment mentioned, to vote or refrain from voting at the said election, against the form of the statute in that case made and provided, and against the peace of our Sovereign Lady the Queen, her Crown and dignity.

[The indictment then charged in seven additional counts, and in similar terms to the second count, different acts of bribery committed by the defendant at the same election, each count charging a separate and distinct act of bribery.]

I reserved the following questions for the consideration of the court: 1. Whether Mr. Jones had jurisdiction to make an order for the trial in the county of Derby for the offence of bribery committed in the borough of Nottingham. 2. Whether the order is sufficient without describing the nature of the corrupt practice. 3. Whether the indictment ought not to have been found by a Nottingham grand jury, and then remitted for trial to Derby. 4. Whether the indictment ought not to have set out on the face of it the facts which conferred jurisdiction to indict and try in Derbyshire an offence committed in Nottingham. 5. Whether the order, which merely mentions "a corrupt practice," warranted the prosecution in Derbyshire of the several distinct acts of bribery contained in the indictment, or whether the indictment ought to have been confined to a single act of bribery. 6. If the indictment ought to have been confined to a single act of bribery, could the prosecutor, having regard to the form of the order, which gives no description of the corrupt practice referred to in it, elect to proceed upon any particular count?

In form the order and indictment in Champion's case are similar to those in Riley's case.

Precisely the same questions arise in each of the cases.

If the answer to either of the above questions is fatal to the prosecution, the convictions are to be reversed.

The Acts referred to are: 47 & 48 Vict. c. 70, s. 28, sub-sect. 5; 46 & 47 Vict. c. 51, s. 6.

By sub-sect. 5 of sect. 28 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), it is enacted that,

Where a person is so prosecuted for any such offence (i.e., before an election court for any corrupt or illegal practice), and either he elects to be tried by a jury or he does not appear before the court, or the court thinks it in the interests of justice expedient that he should be tried before some other court, the court, if of opinion that the evidence is sufficient to put the said person upon his trial for the offence, shall order such person to be prosecuted on indictment, or before a court of summary jurisdiction, as the case may require, for the said offence; and in either case may order him to be prosecuted before such court as may be named in the order; and for all purposes preliminary and of and incidental to such prosecution the offence shall be deemed to have been committed within the jurisdiction of the court so named.

By sect. 6 (1) of the same Act it is enacted that,

The expression "corrupt practice" in this Act means any of the following offences, namely, treating, undue influence, bribery, and personation as defined by the enactments set forth in Part One of the Third Schedule to this Act, and aiding, abetting, counselling, and procuring the commission of the offence of personation.

Stanger, for the defendant *Riley*, contended that the commissioner had no power to order the prosecution to take place in a court which had not jurisdiction to try offences committed in Nottingham. The word "other" in sect. 28 (5) of the Act merely meant other than the election court; and not any other court in the kingdom. If this were not so, the trial might be sent to a petty sessional court in any distant part of the kingdom. Assuming, however, that the commissioner had power to make the order, the particular offence for which the defendants were to

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be tried should have been specified, whereas the order merely directed the trial for a corrupt practice, and it was impossible to tell from that which was the corrupt practice for which they were to be tried. The judge at the trial should, according to *Reg. v. Fudge* (9 L. T. Rep. N. S. 777; 9 Cox C. C. 430; 10 Jur. N. S. 160; 33 L. Jur. 74, M. C.; L. & C. 390; 12 W. R. 351), have quashed all the counts except that which there was jurisdiction given by the order to try, had it been possible to tell which was the count which was supported by the order. The court had no jurisdiction at common law to try the indictment, and it was therefore necessary for the order of the commissioner to state the offence to try which it was intended to give the court jurisdiction. In the first place, then, the order was bad for omitting to state what the corrupt practice was; and, in the second place, as "a corrupt practice" in the order could only mean one offence, the indictment was bad, because too many offences were charged in it. By sect. 55 (2) the enactments relating to charges before justices against persons for indictable offences are applied to every case where an election court orders a prosecution; and by 11 & 12 Vict. c. 42, s. 25, a justice of the peace is to make out a commitment order in the form contained in the Act. The order of the election court is in effect therefore a commitment order, and must follow the statutory form. With regard to the second point, that the indictment was bad on the face of it, the venue in the margin being Derbyshire, was inconsistent with the venue in the body of the indictment, it being there stated that the offence was committed in Nottingham. The court in Derby had no jurisdiction to try an offence committed in Nottingham; and by the indictment it must appear that the court have jurisdiction to try the offence charged (7 Geo. 4, c. 64), whereas here there was nothing to show on the face of the indictment that the court had jurisdiction; but, on the contrary, the indictment by itself showed that the court had not jurisdiction.

W. H. Stevenson appeared for the defendant *Campion*, but was not allowed to argue, as the points taken at the trial on behalf of both defendants were the same.

Buszard, Q.C. (with him *A. E. Rickards*) submitted, on behalf of the prosecution, that, as to the first point, power was derived by the commissioner to make the order from sub-sect. 5 of sect. 28 of 47 & 48 Vict. c. 70, the concluding words of which would be absolutely meaningless unless they were intended to enable such an order as the present to be made. For all purposes of trial it was to be assumed that Nottingham was in the county of Derby. The words "any other court" meant any other court having jurisdiction to deal with the offence of bribery, and this view was strengthened by the words "as the case may require." With regard to the sufficiency of the order, in the first place, the registrar in drawing up the order had followed the exact words of the Act of Parliament; and, in the second place, it was merely an order of committal in which the

same particularity was not required as if it had been an order of execution. Further, no injustice was done to the defendant by the indefiniteness of the order, for he was at the trial of the election petition, and knew the charges to which the order related. Further, the order was distinctly limited to one kind of corrupt practice, namely, bribery. As to the necessity for setting out the order in the indictment, in no case was it necessary to do so where the Legislature had enabled the trial of an offence in an adjoining county. There were many instances of such enactments to be found in Archbold, and in the 20th edit., p. 439, is a form of indictment for stealing from a wreck under 24 & 25 Vict. c. 96, s. 64, which enacts that an offender may be indicted and tried either in the county or place in which the offence shall have been committed, or in any county or place next adjoining, which does not contain any recital of the section which enables it to be tried. With regard to the alleged inconsistency in the indictment, it was surely not necessary to state the offence untruly as having been committed in Derby when it was not so committed. Besides which 14 & 15 Vict. c. 100, s. 23 was an answer, for either this was or it was not a case in which local description was required in the body of the indictment. If such description was required, the statement was correct; if it was not required, the statement might be treated as surplusage. Lastly, the first count of the indictment must be good within 25 & 26 Vict. c. 29, and the rest of the counts might be treated as surplusage.

Stanger in reply.

Our. adv. vult.

June 21.—Lord COLERIDGE, C.J.—In these two cases, which are really the same, as they raise exactly similar points, the learned commissioner who was appointed to try the election petition ordered an indictment to be preferred against each of the defendants under the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, for “a corrupt practice,” and he directed the cases to be tried, not in the town of Nottingham, where the offences were committed, but in Derbyshire. The indictments were headed “Derbyshire to wit,” and although the venue was laid in Derbyshire, as by statute it was right to lay it, in the body of each of the indictments the offences were described as having been committed in the town and county of Nottingham. In the course of the trial it was objected that the judge who tried the cases in Derbyshire had no jurisdiction to try in respect of offences which were alleged to have been committed in Nottinghamshire. We are all of opinion, however, that that objection fails, because the Act of Parliament enabled the trial to take place in Derbyshire. And the effect of the statute was for the purposes of the trial in Derbyshire to remove the whole *locus in quo* of the offences into the county of Derby, in which jurisdiction was given to try them. There are, in fact, two answers to the objection: for either you may treat

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the words in the body of the indictment as surplusage; or in form from a legal point of view the statements are not inconsistent. Parliament have chosen for very good reasons, in order to prevent any interference with the course of justice owing to party feeling being strong in the place in which an offence is alleged to have been committed, and in order to afford a fair trial, to enable the commissioner to send a case for trial into a neighbouring, or indeed into any other county, and when the Act of Parliament says that “for all purposes preliminary and of and incidental to such prosecution the offence shall be deemed to have been committed within the jurisdiction of the court so named,” it means that for the purposes of trial everything is to follow that may be necessary to give the court before which the case is tried in Derbyshire jurisdiction to try it. The statement of the offences in each of the indictments was therefore a proper one, and in my opinion that point fails. Another point was taken which was a serious one, and worthy of consideration. The defendants were sent to be tried for, in the words of the commissioner’s order, having committed “a corrupt practice.” Now, the indictments did not confine themselves each to the statement of one corrupt act, but ran into many counts, in each of which a separate and distinct act of corruption was charged. The answer seems to me to be this, that the commissioner acted within his jurisdiction in following the words of the Act of Parliament, and that he necessarily sent the defendants for trial for a corrupt practice, inasmuch as the offence mentioned in the Act is any corrupt or illegal practice. When he used the words “a corrupt practice” the expression is to be interpreted “some corrupt practice,” and therefore he sent the defendants to be tried for “some corrupt practice.” When, therefore, you come to state in the indictments what the defendants are charged with, you may state as many corrupt practices as you like, and either they would each of them become corrupt practices, or the commission of a number of different corrupt acts at the same election would show a habit of committing such acts which would amount to a “corrupt practice.” Whichever view is taken the indictment is right, because the commissioner acted within his jurisdiction, and the statement of the offence in each case is a statement of a proper parliamentary offence. I think, therefore, that these indictments were good, and that the convictions must be affirmed. My brother Mathew desires me to say that he concurs with me in my judgment.

HAWKINS, J.—This case came before me for trial at the last Derby Assizes, and I confess that the points raised at the trial struck me as deserving grave consideration. I am bound to say, too, that at the present time my doubts are not altogether removed. At the same time they are not sufficiently strong to cause me to differ from my learned brothers in the conclusions at which they have arrived. In the first place, I am not satisfied

that there was power to send this indictment for trial into a county other than that in which the offence was alleged to have been committed. With regard to the objection raised to the indictment, assuming that there was power to send it for trial in Derbyshire, I have brought myself to the conclusion that the indictment sufficiently states that the offence was committed in Derbyshire. Sub-sect. 5 of sect. 28 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, enacts that, "for all purposes preliminary and of and incidental to such prosecution the offence shall be deemed to have been committed within the jurisdiction of the court so named;" that is to say, of the court named in the order transferring the prosecution of the crime to another county; and I think, that being so, and assuming that there is power to send the case for trial into another county, this part of the section means that for the purposes of that prosecution the offence shall be deemed to have been committed in some part of the county in which it is directed to be tried. Here it is alleged that a corrupt practice was committed in Nottingham, while the venue in the margin of the indictment is Derby, and I think that the statute 14 & 15 Vict. c. 100, is applicable, sect. 23 of which enacts that "it shall not be necessary to state any venue in the body of an indictment, but the county, city, or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment." Now, by virtue of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, coupled with the order of the commissioner, the county of Nottingham, or that part of the county of Nottingham in which the offence was committed, must be deemed for all purposes of trial to be situated in the county of Derby, in which county the offence was to be tried. There is, therefore, no inconsistency in stating that an offence committed in Nottingham was committed within the jurisdiction of the county of Derby; for Nottingham is, by virtue of the statute coupled with the order of the commissioner, to be deemed to be part of the county of Derby, and it would not have been wrong to have said in the indictment that the offence was committed in the county of Nottingham in the county of Derby. Then it is suggested that, granted it was committed in the county of Derby, and that you might say that part of the county of Nottingham was transferred into the county of Derby, it nevertheless ought to have been stated on the face of the indictment how it was that the court in Derby had jurisdiction to deal with the case. Upon consideration, however, I have come to the conclusion that there is nothing in that objection. One finds upon reference to a book with which we are all familiar, I mean Archbold's Criminal Pleadings, a whole host of instances in which for an offence committed in one county an indictment may be preferred in another county, and it has never been held to be necessary in any of such cases to state upon the face of the indictment that the person indicted was in custody in that particular county, or any other

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facts, in order to show jurisdiction to try the indictment in the county in which it was preferred. In *Reg. v. George Whiley* (1 C. & K. 150), a case reserved for the consideration of the fifteen judges of the Queen's Bench, the marginal note states this: “If an indictment for bigamy be tried at the same assizes at which the bill is found, it will sufficiently appear, by the caption of the indictment, that the party is in custody in the county, so as to give the court jurisdiction under the statute 9 Geo. 4, c. 31, s. 22, and there need not in that case be any averment in the indictment as to the custody.” It seems to me that that case is directly in point. I confess that my doubt still remains with regard to the validity of the order of the commissioner itself—not with respect to the transfer of the prosecution to another county, but with respect to the form of the order itself. It runs thus: “Whereas Samuel Riley has this day been prosecuted before me for a corrupt practice. And whereas I think it in the interest of justice expedient that the said Samuel Riley should be tried before some other court. And whereas I am of opinion that the evidence is sufficient to put the said Samuel Riley upon his trial for the said offence. I do therefore order the said Samuel Riley to be prosecuted on indictment for the said offence before the justices of oyer and terminer and gaol delivery at the sessions of oyer and terminer and gaol delivery to be holden at Derby in and for the county of Derby;” then the man is committed for trial for that offence. It is clear that the order deals with “a corrupt practice,” and states that the man is to be prosecuted “for the said offence.” Surely that relates to one offence only, and not to more than one. The indictment, however, relates to several offences and contains a number of counts, each charging the commission of a separate offence; and it is quite clear that, if the order is to be read as a direction for the prosecution of the man for a particular offence, since there are eight or nine offences which are being prosecuted under this indictment, which the offence is to which the order relates is left undetermined. However, I am not at all sure that the order may not be sustained upon other considerations, and I have a very strong feeling in this matter that the words “a corrupt practice” in this particular order refers not to any specific offence of bribery, or to any one of those offences enumerated in the definition of “a corrupt practice.” But that they mean that this man's habit during the election had been to endeavour to influence the result of the election by what may be described as “a corrupt practice.” Whether such habit was to influence the result of the election by bribery or otherwise I do not stop to consider. But it seems to me that what he was intended to be charged with was corrupt conduct during the election, which conduct was properly charged as “a corrupt practice;” and the order may therefore be construed as a direction that he should be prosecuted at the assizes for his corrupt conduct at the election. On looking at the definition of the words “corrupt practice” in

the Act it is found that the expression "corrupt practice" in this Act means any of the following offences, namely, treating, undue influence, bribery, and so on. It strikes me, therefore, although I should have preferred to have seen the order set forth the offences to which it was intended to apply, that it may be construed as being intended to apply to those offences which are comprised in the definition of the words "corrupt practice" in the Act, and as authorising a prosecution for the whole or any of those offences committed during the election. If it were to be construed as authorising a prosecution for only one of those offences, as there would be nothing to indicate the particular offence to which it referred, I think it would have been wrong to have indicted for a number of offences upon such an order. It would stand to reason that the prosecution of nine out of the ten offences would have been without jurisdiction, and there would have been nothing to show which was the offence for which there was jurisdiction. My doubts, however, are not sufficiently strong to cause me to differ from my learned brothers, and I am therefore, although hesitatingly, of opinion that these convictions should be affirmed.

DAY, J.—I entirely concur with my Lord, and I am asked by my brother Grantham to say that he also concurs.

Convictions affirmed.

Solicitor for the prosecution, *The Solicitor to the Treasury.*

Solicitor for the defendants, *E. H. Fraser, Nottingham.*

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QUEEN'S BENCH DIVISION.

Tuesday, April 30, 1890.

(Before Lord COLERIDGE, C.J. and MATHEW, J.)

ANDERSON (app.) v. HAMLIN (resp.) (a)

Fishery Board—Person fishing without a licence—Authority of water bailiff to prosecute—25 & 26 Vict. c. 109, s. 35; 28 & 29 Vict. c. 121, ss. 27, 35; 36 & 37 Vict. c. 71, ss. 36, 62, 65 (Salmon Fishery Acts, 1861 to 1873)—41 & 42 Vict. c. 39, ss. 2, 6, 7, 8 (Freshwater Fisheries Act, 1878)

Upon the application and complaint of H., a duly appointed water

(a) Reported by MERVYN LL. PERL, Esq., Barrister-at-Law.

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bailiff in the employment of the Avon, Brue, and Parrett Fishery Board, A. was summoned for fishing within the Avon, Brue, and Parrett District for trout, with a rod and line, without a licence. At the hearing of the case before the magistrates H. stated that he had received a letter from the clerk to the Fishery Board, directing him to institute the proceedings against A. He did not produce the letter, however, although notice was given to him to do so, and was unable to say whether the Fishery Board had met and passed any resolution authorising the proceedings.

The magistrates convicted and fined A., and upon appeal it was Held (allowing the appeal and quashing the conviction), that the Fishery Board were the only proper persons to take proceedings against A., and that as H. did not show a distinct authority from the board to take the proceedings he must be taken to have been unauthorised.

CASE stated under 20 & 21 Vict. c. 43, by the magistrates for the county of Somerset, sitting at Taunton Petty Sessions, on the 20th day of July, 1889.

The facts set out in the special case, so far as material to the question on which the court gave judgment, were as follows:—

The Avon, Brue, and Parrett Fishery District was formed, and its limits defined, and the board of conservators for the said fishery district were duly appointed in accordance with the provisions of the Salmon Fishery Acts, 1861 to 1876.

In exercise of the powers given by 41 & 42 Vict. c. 39, s. 7 (Freshwater Fisheries Act, 1878) the said board of conservators had issued a scale of licences for fishing for trout and char within their district, which had been approved by the Secretary of State, and which was at the time of the alleged offence in force throughout the said fishery district. As fixed by this scale, the price of a licence to fish with a rod and line for trout and char was—for the season, 2s. 6d.; for one month, 1s.; and for one day, 6d.

On the 9th day of July, 1889, W. Anderson fished with a rod and line for trout in the Staplegrove Brook without having taken out any licence so to do.

Albert Hamlin was a water bailiff duly appointed by, and then in the employment of the said board of conservators.

On the 20th day of July, 1889, upon a summons obtained on the information and complaint of Hamlin, Anderson was charged before three magistrates at Taunton Petty Sessions, "that he, on the 9th day of July, 1889, at the parish of Staplegrove, in the county of Somerset, and within the division of Taunton, being a place within the Avon, Brue, and Parrett Fishery district, did . . . unlawfully fish with a rod and line for trout without a proper licence." Hamlin, who appeared to prosecute, then stated that he had received a letter from the clerk to the board of conservators, authorising him to take proceedings against Anderson, but did not produce the letter, although notice to produce had been duly served on him, and

could not say whether the board of conservators had met and passed any resolution authorising the proceedings.

The magistrates, being of opinion that Hamlin had authority as a duly appointed water bailiff under the Salmon Fishery Acts, 1861 to 1873, and under 36 & 37 Vict. c. 71, ss. 36 and 62, to prefer the information and complaint, convicted Anderson, and fined him 1s. and costs. Anderson appealed.

Upon the facts a question of law for the opinion of the court was, whether Hamlin, as water bailiff, was qualified to take legal proceedings under the Salmon Fishery Acts, 1861 to 1873, and the Freshwater Fisheries Act, 1878, against Anderson, unless he could show he was authorised by the Fishery board to do so, or whether, in default of such authority, anyone but the board of conservators for the Avon, Brue, and Parrett Fishery District could take such proceedings.

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28 & 29 Vict. c. 121, s. 35 (Salmon Fishery Act, 1865) provides that:

Any person fishing in a fishery district with a rod and line for salmon without a proper licence shall be liable to a penalty. . . .

Sect. 27 of the same Act enumerates the powers of a board of conservators within their district, and sub-sect. 4 states one of their powers to be:

To take legal proceedings against persons violating the provisions of the Salmon Fishery Acts. . . .

By 41 & 42 Vict. c. 39, ss. 2, 6, 7, 8 (Freshwater Fisheries Act, 1878) it is provided (*inter alia*) as follows:—

Sect. 2. This Act shall, so far as is consistent with the tenour thereof, be read as one with the Salmon Fishery Acts, 1861 to 1876.

Sect. 6. The provisions of the Salmon Fishery Acts, 1865 and 1873, which relate to the formation, alteration, combination, and dissolution of fishery districts, and to the appointment, qualification, proceedings, and powers of conservators, shall extend and apply to all waters within the limits of this Act frequented by trout or char.

Sect. 7. In any fishery district subject to a board of conservators, the conservators shall have power to issue licences for the day, week, season, or any part thereof, to all persons fishing for trout or char, and in the event of the power being exercised in any fishery district, the provisions of the thirty-fifth section of the Salmon Fishery Act 1865 . . . shall, with respect to such district, be construed as if the words "trout or char" were inserted after the word "salmon."

Sect. 8. The provisions of the 36th section of the Salmon Fishery Act, 1873, relative to the powers of water bailiffs, shall extend and apply to all waters within the limits of this Act, as if the words "salmon river," wherever they occur in such section, included all waters frequented by salmon, trout, or char.

Sect. 36 of 36 & 37 Vict. c. 71 (Salmon Fishery Act, 1873), enumerates the powers of water bailiffs, and sub-sect. 4 provides

For the enforcement of the provisions of the Salmon Fishery Acts, 1861 to 1873, every water bailiff shall be deemed a constable, and to have all the same powers and privileges, and be subject to the same liabilities as a constable duly appointed now has, or is subject to, in his constabliwick, by virtue of the common law of the realm or any statute."

Sect. 62 of the same Act, after providing that all penalties imposed by the Salmon Fishery Acts, 1861 to 1873, may be recovered

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within six months before two justices in manner directed by 11 & 12 Vict. c. 43 (Jervis's Act), proceeds :

And all moneys received and penalties recovered under the said Acts, or any of them, on the complaint of a board of conservators, or of any officer of, or a person authorised by a board of conservators, shall be paid to the board of conservators for the district, to be applied by them for the purposes of the Salmon Fishery Acts 1861 to 1873 (unless the court for some special reason otherwise order.)

Sect. 65 of the same Act repeals (*inter alia*) sect. 35 of 24 & 25 Vict. c. 109 (Salmon Fishery Act, 1861).

J. A. Thorne for the appellant.—The proceedings were not well instituted by the water bailiff, he being a person without authority to commence such proceedings. Whatever may be the powers of a constable to institute proceedings for offences, it is submitted that under the Salmon Fishery Acts the case is different, and that the provisions contained in the Act of Parliament are such as to make the board of conservators the only proper persons to prosecute. Sect. 36 of the Act of 1873 lays down what the power of water bailiffs shall be. Neither in terms nor by implication does it confer upon water bailiffs the power to commence proceedings at law. Sect. 27 of the Act of 1865 states the powers of boards of conservators, and sub-sect. 4 expressly places upon the conservators the duty of taking legal proceedings against persons violating the provisions of the Salmon Fishery Acts. There is a universal practice that water bailiffs do not institute proceedings without first reporting to the conservators and getting from them directions to do so. As to sect. 36 (4) of the Act of 1873, which declares that, for the enforcement of the Salmon Fishery Acts, every water bailiff shall be deemed a constable, and have the same powers, privileges, and liabilities, that only applies to such powers as are given him by the Acts. There is a difference between his powers and those of a constable, and his status is different. The words to which the magistrates attached importance, and on which they relied, are those in sect. 62 of the same Act : "The complaint of any officer of," &c. ; but it is submitted that that is not strong enough to get over the difficulty. [Lord COLERIDGE, C.J. here referred to *Reg. v. Cubitt*, 60 L. T. Rep. N. S. 638 ; 22 Q. B. Div. 622.]

Willis Bund for the respondent.—Under the Act of 1861, sect. 35, all penalties were to be recovered under Jervis's Act, and anybody could lay an information, and would get half the penalty. Then came the Act of 1865, which instituted fishery boards, and authorised the conservators to take proceedings. Therefore there was a concurrent right. Whether the conservators or anybody else took proceedings half the penalty would go to the person prosecuting, and the other half in the manner provided by Jervis's Act. Then, in 1873, the Legislature thought that the conservators should get the whole of the penalty when they took the proceedings. The effect of sect. 62 of the Act of 1873 was to take away from boards of conservators the prior right to the half only of the penalty, in cases where they or their

officers or persons authorised by them prosecuted, and to give them the whole. [MATHEW, J.—Does not that mean that the prosecution shall be instituted by them?] Only if they complain. It does not say that all penalties recovered shall be paid to the conservators. There is nothing to prevent the right of any of the Queen's subjects who choose to turn informers. The section is worded in that way that the board may get the penalty only when they take the proceedings, otherwise they would be able to allow any person to take proceedings and yet get the whole penalty themselves. That is how this case is distinguishable from *Reg. v. Hicks* (24 L. J. N. S. 94, M. C.) and *Reg. v. Oubitt* (22 Q. B. Div. 622). It is true that, as a rule, all the proceedings are taken by the conservators, but it is not true that no one can take proceedings but the conservators. It is not a case here where, under the construction of the Act, all the penalties always must go to the fishery board. The water bailiff was perfectly right in his act. As one of the Queen's subjects he had a right to prefer this information, and, although sect. 35 of the Act of 1861 is repealed, there was nothing to take away that right. The repealed section shows that the intention of the Legislature was that the ordinary law should apply, and that the penalty might be recovered on the complaint of any informer, and in that case, now the section is repealed, the only question would be the application of the penalty. Apart from this, it is submitted that, on the true construction of sect. 36 (4) of the Act of 1873, a water bailiff has power to take these proceedings.

Thorne replied.

LORD COLERIDGE, C.J.—This case is not altogether free from difficulty. In interpreting three or four Acts of Parliament which are to be read together, some sections of which are repealed and some are left, it is exceedingly difficult to come to a judgment satisfactory to yourself as to what the statute means. In this case there was a conviction by the magistrates of an offence undoubtedly committed by Anderson against the Fishery Acts. He has been convicted here of fishing for trout—apparently in seasonable times and according to all proper rules of sport—but without a licence. The fees which the Fishery board take for licences go amongst other things to the funds of the board. Now, the only objection we have heard is, that according to the true construction of the Fishery Acts as they are enforced at the present time, the conservators or a person authorised by them are the only persons to put the Act in force. Now, but for one thing, I do not myself entertain much doubt that this conviction must have been upheld, because I do not really doubt, from the way this case is stated, that this man was authorised by the conservators; but unfortunately this fact was not made out, and there was no distinct authority shown authorising the water bailiff in this case to institute proceedings. I must take it, therefore, in this case that the man was not authorised by the conservators. That would not signify, of

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course, if by his general power of law, or by his general jurisdiction of a constable, he could institute proceedings whether the conservators liked it or no. If that were so, we could not shrink from the conclusion that the officers of the conservators, charged with the general authority, might defy their authority, and put the Act in motion against the persons in the first instance charged with the control of the subject-matter, and with the enforcing of this clause. Well, that is a conclusion which in itself would be startling. But, notwithstanding, there being no negative words—the Acts of Parliament saying that it shall be part of the duty of boards of conservators to put the Acts in force, but not saying that nobody else shall put them in force—that argument would have remained. Then it is shown that in sect. 62 of the latter Act of Parliament (*Salmon Fishery Act, 1873*) the penalties imposed by the *Salmon Fishery Acts, 1861 to 1873*, may be recovered in a summary way before two justices, and then all the “moneys received and penalties recovered under the said Acts or any of them, on the complaint of a board of conservators, or of any officer of or a person authorised by a board of conservators, shall be paid to the board of conservators for the district, to be applied by them for the purposes of the *Salmon Fishery Acts, 1861 to 1873*.” Now, those words no doubt are remarkable in themselves, and it occurred to me that the very mentioning of the penalties to be paid to the conservators might imply that it was only in such cases as the conservators prosecuted, and that in other cases they were to be left to the disposal of the law. Now, it seems that up to the passing of this very section, there was a provision for the application of penalties in cases where they did not go to the conservators, but by this very statute of 1873 that provision has been repealed. Therefore, the argument that the penalties in all cases in which they are provided are to go to the conservators is a very strong one. Now, we do not depend upon that alone, because it appears that both in the case of *Reg. v. Hicks* (24 L. J. N. S. 94, M. C.), which was argued in 1855, before Lord Campbell, and in the case of *Rex v. Corden* (4 Burr. 2279) before Lord Mansfield, it was held that where there were no negative words the penalties recovered should go to the person whose private right had been invaded. In both these cases it was held that where a penalty is given to a person whose right is infringed, it is a strong indication that he alone can sue for it. Lord Campbell and the Court of Queen’s Bench gave great weight to this argument. He says that the fact that under the general Act of Parliament, a penalty is to go to the private person whose right of fishery is infringed, shows that the person to whom the penalty is to go is the only person to sue. Therefore, we do not stand upon the construction of the statute, but we are fortified by two strong authorities, one in the time of Lord Campbell and one in the time of Lord Mansfield, that the person who is to receive the penalty is the only person who can sue. Upon that point, there-

fore, and for these reasons, I am of opinion that the conviction must be quashed, and I may observe that in the case to which I have made reference (*Reg. v. Cubitt*, 22 Q. B. Div. 622), which was a decision of my brother Charles and myself—although perhaps there were circumstances there that do not arise in this case—still the court rightly held that where there was a provision in very strong terms as to the persons by whom the Act was to be enforced, no construction ought to be put upon the Act which did not give due force to such a provision. For all these reasons I am of opinion that the conviction is bad, and must be quashed.

MATHEW, J.—The object of these Acts is to intrust extensive powers to conservators. One of the most important of these powers is that of taking legal proceedings against persons violating the provisions of the Acts. The result of Mr. Willis Bund's argument would be that any stranger might institute a prosecution, and a stranger might be in the invidious position of being wholly unable to pay the costs of the prosecution. I entirely agree with my Lord.

Conviction quashed.

Solicitors for the appellant, *W. H. E. Stone*, for *S. B. Cresswell*, Taunton.

Solicitors for the respondent, *Torr, Janeways, and Co.*, for *Barham and Sons*, Bridgwater.

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QUEEN'S BENCH DIVISION.

Thursday, June 12, 1890.

(Before CAVE, and SMITH, JJ.)

CRANE v. LAWRENCE. (a)

Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 6—"Exposed for sale by retail"—Meaning of "exposed for sale"—*Margarine placed out of purchaser's sight.*

A parcel of margarine was kept by a retail dealer in the ordinary course of his business on the counter of his shop behind a screen where it was not visible to and could not be seen by customers

(a) Reported by HENRY LEIGH, Esq., Barrister at-Law.

CRANE
v.
LAWRENCE.

1890.

Margarine
Act, 1887—
Exposure for
sale—Parcel
placed out of
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unless they went behind the counter, which they had no right, and were not allowed, to do. Upon a customer asking to be served with "margarine" the shopkeeper would cut the required portion from the parcel behind the screen and deliver it to such customer in a paper wrapper duly marked with the word "margarine" as required by the Act :—

Held, that the parcel of margarine, being invisible to customers was, not "exposed for sale" within sect. 6 of the Margarine Act, 1887, and so did not require to be labelled, the words "exposed for sale" in that section meaning "exposed" to the view of a purchaser.

THE respondent was summoned before the stipendiary magistrate at Wandsworth for unlawfully exposing for sale, by retail, a "parcel of margarine, there not being then attached to such parcel so exposed a label marked 'margarine,'" contrary to sect. 6 of the Margarine Act, 1887 (50 & 51 Vict. c. 29), and the magistrate, after hearing the evidence, dismissed the summons, and stated the following case for the opinion of the court, raising the question of the proper construction and meaning of the words "exposed for sale" in the above-mentioned section of the Act.

CASE.

1. The appellant is an inspector appointed by the Vestry of St. Mary, Battersea, for the purpose of enforcing the Food and Drugs Act, 1875 (38 & 39 Vict. c. 63) and the Margarine Act, 1887 (50 & 51 Vict. c. 29).

2. The respondent carries on business as a retail dealer in butter, margarine, and other things at his shop in the parish of Battersea.

3. On the 24th day of January, 1890, the appellant entered the respondent's shop and asked the respondent's wife, who was then in charge, to serve him with half a pound of margarine.

4. She complied, cutting the portion required from a parcel of margarine which was then in the shop, and placing such portion in a paper wrapper, upon which was printed the word "margarine," in all respects as required by the Act.

5. This parcel of margarine, being the bulk from which the half pound was taken, is the parcel with reference to which the alleged offence was committed. At the time of the purchase it was placed on the counter behind a screen similar to those used in butter-shops, for the purpose of the butter, &c., being prepared for sale. Before making the purchase the appellant did not see, nor could he see, the parcel of margarine from the side of the counter on which he stood, nor was it open to the view of any of the customers in the shop, unless they went behind the counter, where they were not, in fact, allowed to go.

6. The parcel was not in any case or package, no label or mark of any kind was upon it to indicate that it was margarine; and it was obvious that, even if such a label had been upon it, it could

not have been seen by the customers so long as they remained upon their side of the counter.

7. There was no evidence that the parcel was placed behind the screen for the purpose of evading the Act, or except in the ordinary way of business.

8. On behalf of the appellant it was contended that the respondent had, by placing the parcel of margarine in his shop for the purpose of being forthwith sold by retail, "exposed the same for sale by retail."

8. On behalf of the respondent it was contended that, inasmuch as the said parcel of margarine was not, and could not be seen by customers or other persons using the shop, unless they went behind the counter, the same was not "exposed for sale."

10. I was of opinion that, to constitute exposure for sale, the margarine must be in such a position as to be seen by customers standing in their usual place in the shop, and as the parcel of margarine in question could not be thus seen, and as a label upon it under such circumstances would be useless, I held that the offence was not committed, and accordingly dismissed the summons.

The question for the court is, whether I was right in my said decision, and, if not, what should be done?

The following are the sections of the Margarine Act (50 & 51 Vict. c. 43) material to the present case:

Sect. 4. Every person dealing in margarine, whether wholesale or retail, whether a manufacturer or importer, or as consignor or consignee, or as commission agent or otherwise, who is found guilty of an offence under this Act, shall be liable, on summary conviction, for the first offence to a fine not exceeding £20, and for the second offence to a fine not exceeding £50, and for the third or any subsequent offence to a fine not exceeding £100.

Sect. 6. Every person dealing in margarine in the manner prescribed in the preceding section shall conform to the following regulations: Every package, whether open or closed, and containing margarine, shall be branded or durably marked "Margarine" on the top, bottom, and sides, in printed capital letters, not less than three-quarters of an inch square; and if such margarine be exposed for sale by retail, there shall be attached to each parcel thereof so exposed, and in such manner as to be clearly visible to the purchaser, a label marked in printed capital letters not less than one and a half inches square, "Margarine," and every person selling margarine by retail, save in a package duly branded or durably marked as aforesaid, shall in every case deliver the same to the purchaser in or with a paper wrapper, on which shall be printed in capital letters, not less than a quarter of an inch square, "Margarine."

Earle, for the appellant.—Sect. 6 of the Margarine Act provides that margarine in the hands of a retail trader shall always be marked. If it is intended for sale, it must not be put anywhere where the mark cannot be seen. The words "exposed for sale" in the section mean "put out for sale," and not necessarily "exposed to view;" and here the margarine was put out on the counter ready for sale, and was the bulk from which the respondent was actually selling by retail. The object of the Act is to give protection to inquirers after butter, and all margarine put out for the purpose of immediate sale ought to be labelled, and the label ought to be visible to the purchaser.

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The respondent, who was not represented, was not called upon,

CAVE, J.—In this case I am of opinion that the objection raised by the appellant cannot be sustained, and that the learned magistrate's decision was quite right. Sect. 6 of the Margarine Act prohibits under a penalty certain things, and it is a sound rule of construction that, when a penalty or other disability is inflicted by statute on a subject, the language in which the penal section is couched should be looked at most carefully. Now, the important words here are "exposed for sale by retail," and it is obvious that the word "exposed" may bear different meaning under different circumstances. A thing may be exposed to air, or exposed to water, or exposed to view, and so on; and we must look at the surrounding circumstances in each case. Here the article in question, the margarine, is to be "exposed" to the view of customers in the shop, so that they may have the opportunity of seeing that the article is "margarine" and not "butter," and if, having so seen it, they choose to purchase it, they will at all events do so with their eyes open. When it is so "exposed to view," then it must be labelled "margarine" in big letters. Any other interpretation of the words of the Act would be unnatural and unreasonable. Let us suppose the case of a small retailer who, having no room for the article in his shop, keeps his stock of margarine in a cask or case in his cellar or in a back room, where of course it could not be seen by any customer in the shop, and that when a customer asks for some the man goes down his cellar or into the back room and cuts off the quantity required from the parcel of margarine—would it not be absurd to say that that parcel of margarine was "exposed for sale," and that a marked label must be affixed to it, or to the cask containing it, in the back room or cellar? for, if the margarine itself is invisible to the purchaser, it is difficult to see how the label affixed to it is to be visible to him. Keeping margarine for sale is not "exposing" it for sale. The object of the Act clearly is to prevent persons who see attractive-looking stuff of tempting colour from being misled, and induced to purchase an article which, ignorantly, they believe to be "butter," but which in fact is only the counterfeit substitute "margarine."

SMITH, J.—I also am of opinion that the learned magistrate was right in his decision in this case. The question of labelling does not arise or come into play until the margarine is "exposed for sale;" and "exposed" here means either kept in the shop in the labelled cask, or, if out of the cask, so exposed in bulk in the shop as to be visible to customers in the shop, and then it must have a label affixed to it, showing to intending purchasers clearly what it really is. The words "exposed for sale" are, if reasonably and naturally construed, equivalent to "exposed" or exhibited to the view of an intending purchaser.

Solicitor for the appellant, *W. W. Young.*

QUEEN'S BENCH DIVISION.

Thursday, July 10, 1890.

(Before POLLOCK, B. and SMITH, J.)

ROBERTS (app.) v. WOODWARD (resp.). (a)

Sale of coal in sacks—Weighing same on delivery—Representation of weight by seller's servant—Liability of seller—Short weight—Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 29, sub-sects. (1), (2).

The respondent, a greengrocer and coal dealer, was in the habit of having coal brought to his premises in sacks, which were weighed in the presence of his servant and left on the premises for the purpose of sale and delivery to his customers. Having received orders for 5cwt. of coal, the respondent directed his servant to deliver the same to customers who had ordered them. The servant accordingly took five sacks of coal, believing each sack to contain 1cwt., and placed them in his master's cart, and whilst on his way to deliver them to the customers he was stopped by an inspector of the London County Council, the local authority, who asked him what weight each sack contained, to which he replied "1cwt." On being weighed by the inspector, a deficiency was found in the weight of four of the sacks.

Held, that the respondent, the seller of the coal, was not liable under sect. 29, sub-sect. 2, of the Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), as there was no representation by him of the weight, and that the servant was not liable, as he was not the seller of the coal

Mullins v. Collins (L. Rep. 9 Q. B. 292; 43 L. J. 67, M. C.) referred to and distinguished.

THIS was a case stated by the police magistrate of the North London Police-court, at the request of the appellant who was an inspector appointed by the London County Council for the purposes of the Weights and Measures Act, 1889 (52 & 53 Vict. c. 21).

The respondent was a greengrocer and seller of coal and his custom was to have the coal brought to his premises by his servant in sacks, which were weighed in the presence of the servant, and which the servant alleged were correct in weight. The sacks were then placed on respondent's premises for the purpose of being sold and delivered to his customers as ordered.

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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Having received two orders for coal, one for 4cwt. and the other for 1cwt., the respondent directed his servant, one Charles Watson, to deliver those quantities to the persons requiring them.

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In pursuance of that direction Watson took from his master's shop five sacks of coal believing that each sack contained 1cwt., and placed them on the respondent's vehicle for the purpose of delivery.

While on the way to deliver the sacks, Watson was stopped by the duly appointed officer of the London County Council, the local authority, who inquired of him what weight the sacks contained, and upon being told by Watson that they contained 1cwt. each, he proceeded to weigh them, when he found one of the sacks was 38lb., another 17lb., and another 7lb. short of 1cwt.

The respondent was then charged under sect. 29, which enacts:

Sub-sect. 1. Any inspector of weights and measures, or officer appointed for the purpose by the local authority, may at all reasonable times enter any building or part of a building or other place in which coal is sold or kept, or exposed for sale, and may stop any vehicle carrying coal for sale or for delivery to a purchaser, and may test any weights and weighing instruments found in any such place or vehicle, and may weigh any load, sack, or other less quantity of coal found in any such place or vehicle, or which is in course of delivery to any purchaser.

Sub-sect. 2. If it appears to a court of summary jurisdiction that any load, sack, or less quantity so weighed is of less weight than that represented by the seller, the person selling or keeping, or exposing the coal for sale, or the person in charge of the vehicle, as the case may be, shall be liable to a fine not exceeding five pounds.

The police magistrate was of opinion that the respondent had not made any representation as to the weight of the coal, and refused to convict him. The question for the court was whether he ought or not to have convicted him.

Meadows White, Q.C., for the appellant, contended that the respondent was liable, inasmuch as the sacks of coal, which were weighed during the course of delivery and found deficient, were in his cart, and in charge of his servant. The Act was intended to prevent carelessness, and if there is a representation by the servant that the coal is of greater weight than it really is, although there is no fraud, the seller is liable to the penalties under the Act. The whole course of business here contains a representation by the respondent, the master; the sacks were standing in his shop, representing that they contained a certain weight; the servant Watson was ordered by the respondent to take the sacks of coal out of the shop and deliver them to the customers, and his representation as the servant in charge of the vehicle in course of delivery, and until completion of delivery, was a representation by the master: (*Mullins v. Collins*, L. Rep. 9 Q. B. 292; 43 L. J. 67, M.C.)

Neville, for the respondent, was not called upon.

POLLOCK, B.—It may be doubtful whether the Legislature has provided a remedy for persons who receive short weight in all cases where a remedy would be very desirable; but the words of sect. 29, sub-sect. 2 of the Weights and Measures Act, 1889, are

clear that, in order to make the seller liable to the penalties under the Act, there must be a representation as to the weight of the coal sold, and that that representation must be made by the seller himself. In the case of hawkers selling coals in the streets, there would be a verbal representation by the sellers. But here there was no such representation. The second point urged on behalf of the appellant was that if the servant in charge of the vehicle and delivering the coal represented to anyone that the sacks were of a certain weight, and that representation was not a true one, the master would be liable to the penalty. That was not so. There was no instance in which a master was made criminally liable for the acts of his servant, unless in such a case as when the servant was doing some illegal act, and the master was making a profit out of it. The decision of the magistrate was right in this case, and must be upheld.

SMITH, J.—I am of the same opinion. The Act was no doubt passed to prevent negligence, and for the protection of poor people, who were frequently defrauded by receiving coal of much less weight than they paid for. But there must be a representation by the seller to bring him within the Act. In this case the servant cannot be got at because he was not selling, and therefore it was not possible to get a conviction against him; the master cannot be liable because he made no representation; he simply gave his servant instructions to deliver certain sacks to the vendee. It was contended by Mr. Meadows White for the appellant that the master was liable for the representation of his servant made in the course of delivery, and in support of that contention the case of *Mullins v. Collins* (*ubi sup.*) was referred to, where it was held that a licensed victualler was liable to be convicted under the Licensing Act 1872 (35 & 36 Vict. c. 94) s. 16, for the act of his servant in supplying liquor to a constable on duty. That case, however, belongs to a class of strange cases; they were law, but were decided under stringent Acts with respect to the regulation of beerhouses. This appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellant, *Reginald Ward*.

Solicitor for the respondent, *John Godwin*.

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Ireland.

COURT FOR CROWN CASES RESERVED.

November 19 and 25, 1889.

(Before Sir M. MORRIS, C.J., PALLES, C.B., and HARRISON,
O'BRIEN, JOHNSON, ANDREWS, MURPHY, HOLMES, and
GIBSON, J.J.)

REG. v. EDWARD FOLEY. (a)

Larceny at common law—Growing grass—Abandonment of possession by trespasser.

A trespasser entered the close of another and cut growing grass, and three days subsequently returned and carried it away for his own use. For these acts he was indicted for larceny at common law, tried, and convicted. Upon a case reserved at the trial:

Held, by the Court for Crown Cases Reserved (Palles, C.B. dissentiente) that the conviction was good.

Reg. v. Townley (12 Cox C. C. 59; 24 L. T. Rep. N. S. 517; L. Rep. 1 C. C. R. 315; 40 L. J. 144, M. O.; 19 W. R. 725) and Reg. v. Petch (14 Cox C. C. 116; 33 L. T. Rep. N. S. 788) distinguished.

THE facts as appeared from the case reserved by Gibson. J. from the Maryborough Summer Assizes, 1889, were as follows:

The prisoner was formerly a tenant of certain lands called Ballyadams, from which he was evicted and his house levelled.

On the 10th day of August, 1888, the prisoner was proved to have been seen on the land cutting growing grass, and again he was likewise engaged on the 19th day of August. On the 13th day of August he returned and removed the grass.

For these acts he was indicted for larceny at common law and convicted by the jury, who found that the prisoner did not at any time abandon possession of the grass, under the advice of the judge, who, however, reserved a case for the opinion of this court as to whether the conviction was right.

E. Leamy for the prisoner.—The severance of the grass, which was part of the freehold, and its removal was not larceny at common law, although if the prisoner abandoned possession

(a) Reported by FREDERICK F. LEDWICH, Esq., Barrister-at-Law.

it might be otherwise. In the present case the jury find that the prisoner never abandoned possession of the grass. The point is decided in prisoner's favour by *Reg. v. Townley (ubi sup.)* and *Reg. v. Petch (ubi sup.)*.

C. Molloy, Q.C. and T. P. Law, Q.C. for the Crown, contra.—The law on the point reserved is stated by Blackstone, vol. 4, p. 232, and by Hale (1 Hale's Pl. Cr. 510). *Reg. v. Townley (ubi sup.)* was decided on the ground that the property stolen never was in the owner's possession, and therefore could never have been taken therefrom, inasmuch as it consisted of rabbits, which were *feræ naturæ*, and though when they were killed they did become the subject of ownership, yet at the moment of death they were in the possession of the poacher. In this case the grass was left lying on the land where cut, and on the departure of the prisoner it was then and for days in the open and actual possession of the owner of the soil.

Cur. adv. vult.

Nov. 25, 1889.—GIBSON, J.—I reserved this case for the purpose of settling a question arising, or supposed to arise, upon the decision in *Reg. v. Townley (ubi sup.)*. The evidence is meagre. Assuming that the cutting of the meadow by the accused was some evidence of an assumption of possession of the grass cut, there was no evidence, in my opinion, of any effective possession by him of the grass so left cut, and lying on the owner's ground, from that time until it was carried away, though it must be taken that Foley did not intend to abandon such grass. On these facts the prisoner's counsel, relying on the decision in *Reg. v. Townley*, contended that the prisoner could not be convicted of larceny. The authorities cited by Mr. Molloy, Q.C. (to which may be added East. Pl. Cr., vol. 2, p. 587, and Gabbott's Crim. Law, 557) establish that where a thief, after severing things parcel of the realty, leaves the chattels so severed on the proprietor's soil, and after an interval comes again and takes them away, he is guilty of larceny at common law, the chattel being, at the time of removal, in the constructive possession of the rightful owner. The principle of common law would seem to be that, when the wrongdoer's actual and effective possession ceases he cannot be deemed to be in constructive possession; and that such constructive possession of the severed chattels, crops, fixtures, or otherwise, becomes vested in the rightful owner on whose land they are left, by virtue of his right to possession. For the prisoner it was argued that *Townley's case* is an authority against this view, and that, if wrongful possession is once acquired by the thief, the fact that he may afterwards before removal cease to be in effective occupation and control is immaterial if he does not intend to relinquish the wrongful possession, and in pursuance of his original intent comes and takes away the property. That this contention may not be entirely without colour is shown by the way *Townley's case* is treated by well-known writers. Thus, Mr. R. S. Wright, in his essay on Possession, at p. 231

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says: "It was formerly supposed that the mere leaving of the thing by the taker on the owner's premises for a time, of itself vested a possession in the owner, so as to make a re-occupation by the taker a trespass and (*animus furandi* being present) a theft. But it seems clear that such a relinquishment is merely evidence of an abandonment generally or to the owner more or less conclusive according to the circumstances." So in the last edition of Archbold's *Crim. Law*, at p. 363, it is stated there is no larceny unless the "wrongdoer had between the severance and the taking away intended to abandon his wrongful possession of the article severed. In my opinion *Townley's case* does not decide what is supposed. The continuity of transaction contemplated by the common law as excluding larceny may be considered from the point of view of time, act, and possession. The principal element being possession, if the thief is in continuous possession, the occurrence of an interval of time between the taking and the carrying away can of itself make no difference. *Townley's case* only decides that, where there is evidence of actual possession continuing, the fact that there is an interval of time between the taking and carrying away does not constitute larceny where the wrongdoer's intention is not abandoned, and the transaction is in substance continuous. Secondly, that chattels may be in the thief's possession, though left on the owner's land (the chattels there being rabbits, which were not subject of property until killed). The expressions "abandon" and "intention to abandon," found in the report of *Townley's case*, though not inappropriate when read with reference to the special facts of that case, are liable to misconstruction if employed in reference to such a case as that before us. Where chattels after severance are left on the property of the true owner, no matter what the wrongdoer's intention may be, he cannot escape the common law doctrine if his possession is not in fact continuous. Continuity of intention is not the equivalent of continuity of possession. The transaction here was not continuous, and the conviction is right.

HOLMES, J.—I think that the solution of the question reserved in this case depends upon whether there is any evidence that the grass or hay was not in the possession of the true owner in the interval between the severance and removal. When the grass was growing it belonged to the owner of the land; but, although he was in possession of it as part of the land, he was not in possession of it as a personal chattel. It first became capable of being the subject of larceny when it was severed. It is, I think, clear that where it is severed by a wrong-doer, and as part of one continuous transaction it is carried away by him, there is no larceny. In such a case it has never, as a personal chattel, been in the possession actual or constructive of the true owner. It has been continuously in the actual, though perhaps not always in the physical, possession of the wrong-doer. In the case before us the defendant, having cut the grass, left it on the

lands. Beyond the severance he did no act of any kind evidencing actual possession on his part, and for two days the owner of the land had, it seems to me, precisely the same kind of possession of it as he would have had if it had been cut and left there by his own servant. There cannot, I conceive, be constructive as distinguished from actual possession by a wrong-doer, and when he returned at the end of the period I have mentioned he would be guilty of larceny, unless he was in actual possession in the interval. There is not, however, a particle of evidence of such actual possession, and therefore I hold the conviction right. This conclusion is in strict accordance with the authorities previous to *Reg. v Townley*, referred to by Mr. Molloy, and does not, I think, in any way conflict with that decision. In that case there was abundant evidence that the whole transaction was a continuous act, or, in other words, that the wrong-doers had never been out of actual possession, and under those circumstances the fact upon the assumption on which the case was stated that the poachers had no intention to abandon the wrongful possession of the rabbits which they acquired, but placed them in the ditch as a place of deposit till they could conveniently remove them, was decisive in the prisoner's favour. I consider, however, that that decision has no application to the present case.

JOHNSON, J.—I think the principle of law which governs this case is correctly stated and explained by Blackstone in his Commentaries, vol. 4, p. 232: "and of things likewise that adhere to the freehold, as corn, grass, trees, and the like, no larceny could be committed by the rules of the common law; but the severance was, and in many things is still, merely a trespass, which depends on a subtlety in the legal notions of our ancestors. These things were parcel of the real estate, and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immovable; and if they were severed by violence so as to be changed into movables, and at the same time by one and the same continued act carried off by the person who severed them, they could never be said to be taken from the proprietor in this their newly-acquired state of mobility (which is essential to the nature of larceny), being never, as such, in the actual or constructive possession of any one but of him who committed the trespass. He could not in strictness be said to have taken what at that time were the personal goods of another, since the very act of taking was what turned them into personal goods. But, if the thief severs them at one time, whereby the trespass is completed, and they are converted into personal chattels in the constructive possession of him on whose soil they are left or laid, and comes again at another time when they are so turned into personalty and takes them away, it is larceny; and so it is if the owner, or any one else has severed them." This was the law as stated in 1 Hale P. C. p. 510, and also in 1 Hawk. P. C. 8th edit., book 1, chap. 19, sect. 34, and the other

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text-books, down to the decisions in *Reg. v. Townley* (*ubi sup.*) and *Reg. v. Petch* (*ubi sup.*), in my opinion it is still the law, and is not in conflict with those decisions. In each of those cases the act was treated as, under the circumstances, a continuous transaction, or, in Hale's words, the act was "continued," and not interpolated. It was attempted to distinguish *Reg. v. Petch* from *Reg. v. Townley*, on the ground that the rabbits were hidden by the poacher, and while so hidden some of them were nicked or marked by the keepers of the owner of the soil; but this was found to be merely to identify them, and not to take possession of them for his master. And the court held that the two cases stood on the same footing, and that where a poacher killed, carried off, and hid wild rabbits for a short interval until he could safely or conveniently remove them, the continuity of the poacher's possession was not severed, and therefore it was a trespass and not a larceny. The present case was not a continued trespass, the prisoner cut the grass and went away, leaving it lying on the soil where he cut it. The trespass was completed, and the severed grass became and was a movable chattel in the constructive possession of the owner of the soil, when the prisoner came again after an interval of two or three days, raked the grass together, and carried it away. I am therefore of opinion that the prisoner was rightly convicted of larceny.

PALLES, C.B.—I am unable to concur with the other members of the court. In my opinion the conviction was wrong, and ought to be quashed. We all appear to agree that if the thing taken and carried away is for the first time rendered capable of being stolen by the act of taking, and if the taking and carrying away constitute one continuous act, such taking and carrying away is not theft at common law. We also appear to agree that the rule applies as well to the grass in question here as to the rabbits in *Reg. v. Townley* (*ubi sup.*), and that the reason of the rule is not that the thing taken was not, at the time of the taking, the property of the prosecutor, but because, at the moment at which it became that class of property which can be the subject of larceny—*i.e.*, a personal chattel—it was in the possession, not of the true owner, but of the trespasser. On the other hand, I admit that although the possession of the chattel was in the trespasser by the act of taking, yet, if such possession ceased in fact, by its abandonment by the trespasser, the possession, upon such cesser, became constructively that of the true owner; and that if, during the continuance of such constructive possession, the trespasser again took possession, *animo furandi*, such last-mentioned taking would be larceny. The question, then, for decision is, whether on the facts of the present case, and notwithstanding the finding of the jury on the question left to them, we can say, as a matter of law, that the cutting and carrying away did not constitute one continuous act; or, in other words, that the possession of the prisoner of the severed grass had ceased prior to its removal on the 18th day of August. As to

what constitutes a cesser of possession, it seems clear that it cannot be said that it necessarily takes place the moment the trespasser abandons physical control over the chattel. In *Reg. v. Townley* the rabbits were lying in a ditch for three hours during the absence of the poachers, and were consequently for that period out of their physical power and control; yet it was there held that the question of cesser or abandonment of possession by the trespasser was one not of law, but of fact; and that a verdict negating—as the jury have here negated—intention to abandon, amounted to not guilty. The decision there, therefore, involved the determination that during the entire period whilst the rabbits lay in the ditch, they were in law in the possession, not of the true owner, but of the absent poachers, and were so by reason of the absence in the minds of the poachers of intention to abandon. The same conclusion was arrived at in *Reg. v. Petch* (*ubi sup*), in which the period during which the dead rabbits in the bag were hidden in a hole in the earth must have been nearly an entire day—viz., from half-past eleven on one morning to early on the following morning. I am not quite sure that I understand the exact meaning which Gibson, J. attaches to the word “effective,” when he conceives it to be a principle of the common law that when the wrongdoer’s actual and effective possession ceases, he cannot be deemed to be in constructive possession. If by “effective” he means something different from “actual,” and for this reason distinguishes the present case from *Reg. v. Townley* and *Reg. v. Petch*, I am unable to follow his reasoning. If it can be said, as a matter of law, that the possession of the severed grass by the prisoner in the present case, although actual, was not “effective,” so, too, should have been held the possession for a day of the trapper in *Reg. v. Petch*, and that for three hours of the poacher in *Reg. v. Townley*, during both of which periods the trespassers were absent from the places in which the rabbits were lying, and had therefore no physical control over them. On the other hand, if by “effective” he means no more than is involved in “actual,” then, although I agree in his view, I cannot distinguish the present case from *Townley’s case* and *Petch’s case*. On that supposition it would not be sufficient that the facts are such that the jury might have found that the actual possession of the prisoner had ceased. No doubt they might; but they have found the contrary. *Petch’s case* is a clear authority that if the period which elapsed between the cutting the grass and its ultimate carrying away did not amount to more than a day, the prisoner in the present case (having regard to the finding), would not have been guilty. But if the exact length of the interval be material, we, as distinct from the jurors, cannot determine the exact time, measured in hours or in days, the existence of which will make that larceny which would not have been so had the interval been something less. We cannot say that if the interval be twenty-three hours, it may not be, but that if it be increased to twenty-five hours, or three days, it

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necessarily must be larceny. The question involved is, as decided in *Townley's case*, one of intention, such a question is usually for a jury, and a jury only. If time be—as admittedly it is—material in determining this intention, the only periods between which the common law can recognise a distinction, are between those which are and which are not reasonable. This is the view taken by Stephen, J. in his Digest (4th edit., art. 296): "It seems," he says, "that the taking and carrying away are to be deemed to be continuous, if the intention to carry away after a reasonable time exists at the time of the taking." If this be, as I think it is, the true rule, the jurors alone can, in a case such as the present, determine within which class the period of time in question here must range; and, the question of reasonable time not having been left to the jury or found, considerations arising from the length of the interval cannot, as it seems to me, be relied upon. If, therefore, the conviction under the circumstances proved be right, so must it have been had the interval been three hours or one day instead of three days; and unless there be some other distinction between this and *Townley's case* and *Petch's case*, the present case would appear to be ruled by them. Is there then any distinction? I think not. It is said that here there is an absence of intention, by which I suppose is meant absence of affirmative evidence of intention in the prisoner to remain in possession. Even were this so, it would not justify the judge in withdrawing from the jury the prisoner's intention; for what is material is not the absence of intention to retain possession, but the presence of affirmative intention to abandon. The mere act of cutting was some evidence that the prisoner cut the grass for himself, and intended to use it. He told the police-constable that he (the prisoner) might as well have it as the landlord. This declaration, though made on the 11th, is some evidence of his intention on the 10th, the time of the original cutting. It was competent, too, to the jury to have regard to the character of the act done, and to find that the reason the prisoner refrained for three days from carrying it away was that it might become dry and that he might carry it away as hay. Mr. Molloy, as I understand, contests the proposition laid down by Stephen, J., to which I have already referred, and for that purpose relies mainly upon 1 Hale P. C., 510, and *Lee v. Risdon* (7 Taunt. 191). In the first it is said, "If a man come to steal trees, or the lead of a church or house, and sever it, and after about an hour's time or so come and fetch it away, this hath been held felony, because the act is not continued but interpolated, and so it was agreed by the Court of King's Bench, 9th Car. 2, upon an indictment for stealing the lead of Westminster Abbey." This passage may mean no more than that such an act is capable of being a felony, if so found by the jury; and that the jury should so find if they were of opinion that the act was not continued but interpolated. In *Lee v. Risdon*, the distinction drawn by Gibbs, C.J., is as to that of which felony

can, and that of which it cannot, be committed. "Felony," he says, "cannot be committed of those things," *i.e.*, things attached to the freehold, "but if the thief severs the property, and instantly carries it off, it is no felony at common law. If indeed he lets it remain after it is severed, any time, then the removal of it becomes a felony." The true meaning, however, of these passages was determined by *Reg. v. Townley (ubi sup.)*; Martin, B., explains them in these words: "Those statements may be perfectly correct, and ought perhaps to be followed in cases exactly similar in their facts, where there has been an actual abandonment of possession of the things taken; but here it is expressly found that there was no abandonment; and where the act is merely interrupted, I think it is more reasonable to hold that there is no larceny." This judgment is valuable, as showing two things. First, that the authorities relied upon by Mr. Molloy are applicable only where an actual abandonment of the things taken have been found or admitted; secondly, that the question of abandonment in fact depends upon intention to abandon. There the fact admitted was that the poachers had no intention to abandon; and that is treated by Martin, B. as an express finding that there was no abandonment in fact. Bramwell, B. also treats the case as depending upon intention. "I think our decision," he says, "is consistent with the passage cited from Hale, and the dictum of Gibbs, C.J., referred to, which appear to me to be quite correct. If a man were unlawfully to dig his neighbour's potatoes, and from being disturbed in his work, or any other cause, were to abandon them in the place where he had dug them, and were afterwards, with a fresh intention, to come back and take them away, I think the case would be the same as if, during this interval of time, the potatoes had been locked in a cupboard by the true owner." Byles, J., in the same way treats the fact that the poachers had no intention to abandon as involving that their possession never had been abandoned in fact. Blackburn, J. says: "There is the fact that the rabbits, after being killed, were left hidden in a ditch upon the land for nearly three hours. I should myself have thought that that made no difference in the case." As to the passages cited from Lord Hale, and the dictum of Gibbs, C.J., he adds: "If we are to understand those passages in the sense put upon them by my brother Bramwell, as applying only to a case in which the wrong-doer has abandoned and lost all property and possession in the things in question, I have no quarrel with them, and they do not apply to the present case. But if those passages mean that the mere cessation of physical possession is sufficient to make the subsequent act of removal larceny, then they do apply to the present case, and in that case, great as is my respect for Lord Hale, I cannot follow him." The clear answer then, to the argument of Mr. Molloy, appears to me to be that if the passages he has relied upon are to be read in the sense for which he contends, they are inconsistent with, and have been overruled, by the decision in

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Reg. v. Townley. Upon the whole, I am of opinion that the decision in *Reg. v. Townley*, as applied to the present case, involves the following propositions: 1. That the mere leaving by the prisoner of the field in which he cut the grass was not, *per se*, and irrespective of every other consideration, sufficient to make his subsequent act of removal larceny. 2. That the prisoner's omission for three days to take away the hay was evidence from which a jury might, if they thought fit, have found an abandonment by the prisoner of that possession which he had acquired by the unlawful act of severance. 3. That such question of abandonment involved the intention of the prisoner, and his object in leaving the grass lying upon the field for three days. 4. That such abandonment was essential to a valid conviction; and that, in the present case, in which, instead of being found it has been negatived, the conviction cannot be sustained.

MORRIS, C.J.—I am of opinion that the conviction in this case should be sustained. The question is, was the possession of the hay taken away in the prisoner at the time it was removed, or was it in the possession of the owner of the soil, that is to say, in his constructive possession. Upon the decision of that question depends whether the prisoner was or was not, guilty of larceny. If the cutting and taking away was one continuous act, the prisoner is not guilty. That question should be found in the prisoner's favour to entitle him to an acquittal, but the jury have not so found, they having, no doubt, found that the prisoner did not abandon the possession of the grass, but that was a finding upon a question of law. Furthermore, the jury have found the prisoner guilty. There is no finding that the cutting and removing was one continuous act. In this case the prisoner cut the grass on the 10th and 11th days of August, and was then seen doing so by a policeman. He came again three days after, on the 13th day of August, and removed the hay, and can it be said that the hay was, during all that interval, in the prisoner's possession and not in the possession of the owner of the soil? I do not think it can, or that such removal can be said to be a continuous act with the original taking. That this question of continuity of the act is what must be determined seems to me to be clear on the authority of the cases which have been cited. In *Reg. v. Townley (ubi sup.)*, Bramwell, B., says, at p. 318: "If a man were unlawfully to dig his neighbour's potatoes, and from being disturbed in this work, or any other cause were to abandon them at the place where he dug them, and were afterwards with a fresh intention to come back and take them away, I think the case would be the same as if during the interval the potatoes had been locked in a cupboard by the true owner. Wherever in such cases the goods may be said to have been in the possession of the true owner, in the interval between the severance and the removal, I think the removal is larceny. But is that so in this case? If the poachers had taken these rabbits to their own house or to a public-house,

can it be supposed that the subsequent removal of them from there would have been larceny? and if the case be varied by supposing them to have been placed there upon land adjoining that on which they were killed, can that make any difference?" Then, again, in the same case, Blackburn, J. says, at p. 319: "The result is, that while taking away dead game is larceny, it is otherwise where the killing and taking away are one continuous act." In *Reg. v. Petch* (*ubi sup.*) the decision went on the same ground—the continuity of the act. Field, J. says, at p. 119: "But it is said that the continuity of the possession by the prisoner was broken by the act of the keeper in going to the trap and nicking the rabbits." The learned judge, by the use of the words "continuity of possession," showing the grounds upon which the Court decided the case. The Court in *Reg. v. Townley* decided that the prisoner was not guilty upon the ground that the hiding in the hole in the ground of the dead rabbits was the same as if they had remained in the prisoner's possession. On these grounds I consider that the cases of *Reg. v. Townley* and *Reg. v. Petch* are authorities in favour of the Crown in this case; and I am of opinion that the conviction should be sustained.

HARRISON, O'BRIEN, and ANDREWS, JJ. concurred with the majority of the court.

Conviction affirmed.

Solicitor for the prisoner, *Thomas Gerrard*.

Solicitor for the Crown, *W. Fitzsimon*.

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CROWN CASES RESERVED.

Saturday, Nov. 8, 1890.

(Before DENMAN, POLLOCK, B., HAWKINS, STEPHEN, and CHARLES, JJ.)

REG. v. BOWERMAN. (a)

Larceny—Security for the payment of money—Bill of exchange complete except as to signature of drawer—Acceptance of bill of exchange—Bill handed to prisoner to get discounted subject to directions in writing—Broker or agent—Conversion contrary to directions in writing of sum obtained by discounting bill—24 & 25 Vict. c. 96, s. 75—45 & 46 Vict. c. 61, s. 18.

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

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A document which is a complete bill of exchange in all respects except that of the signature of the drawer is, when in the hands of the intended drawer, a valuable security; and is also, by virtue of sect. 18 of the Bills of Exchange Act, 1882, a bill of exchange. Such a document therefore a security for the payment of money within 24 & 25 Vict. c. 96, s. 75.

Whether a person intrusted with a security for the payment of money with a direction in writing as to its application, or as to the application of the proceeds thereof, was so intrusted as a broker or agent within the meaning of 24 & 25 Vict. c. 96, s. 75, is a question of fact for the jury; and the mere fact that such person had an interest in the transaction greater than that of a mere agent would not deprive him of his capacity as agent.

CASE stated by the Recorder of London for the consideration of the Court of Crown Cases Reserved, as follows:

The prisoner was tried before me at the June sessions of the Central Criminal Court for misdemeanour under the 75th section of 24 & 25th Vict. c. 96. The indictment contained nine counts, which charged the prisoner as follows:

First count.—That he being then a broker and agent, and having been intrusted by Alexander Phillip Tebbitt as such broker and agent with certain securities for the payment of money, to wit, a bill of exchange for payment for 400*l.* and a bill of exchange for payment of 290*l.* 17*s.* 6*d.*, with a direction in writing to apply such securities for a purpose specified in such direction, to wit, for the purpose that the said bills of exchange should be discounted at a moderate rate of interest for the benefit of the said Alexander Phillip Tebbitt, did, in violation of good faith and contrary to the terms of the said direction, unlawfully convert to his own use and benefit the said last-mentioned securities for the payment of money, to wit, for the payment of 400*l.* and 290*l.* 17*s.* 6*d.* respectively.

Second count.—The same offence, but describing the securities for payment of money as acceptances of bills of exchange.

Third and fourth counts.—The same offence, but with a variation of the purpose specified in the direction.

Fifth and sixth counts.—Same form as first and second counts, except that they charge the conversion of the proceeds of the securities for the payment of money.

Seventh and eighth counts.—Same form as fifth and sixth counts, except that they charge the conversion of part of the proceeds of sale.

Ninth count.—This purported to charge a misdemeanour under sect. 90 of 24 & 25 Vict. c. 96, but, after argument, I quashed that count because the words "with intent to defraud" were omitted, and no question arises upon it.

The evidence, so far as is material to the questions submitted to the court, was to the following effect:

Messrs. Tebbitt Brothers, being in need of additional capital,

inserted an advertisement in a newspaper that they required from 10,000*l.* to 15,000*l.* To that advertisement the prisoner replied by sending by post his visiting card, "Mr. Bowerman, Belmont House, Peckham Rye, S.E.," with a memorandum on the back that, should personal services not be essential, he should be glad of some particulars of the advertisement. Shortly afterwards Mr. A. P. Tebbitt called upon the prisoner at his residence, and the prisoner then represented to him that he was a bill broker or money-lender and a bill discounter, and that he had large facilities for advancing the capital required. At a subsequent interview it was arranged that the prisoner was to draw bills upon Messrs. Tebbitt Brothers to the extent of 5000*l.*, and endeavour to get them discounted at a moderate rate of interest, and a document was drawn up and signed by Mr. Tebbitt setting out the terms of the arrangement, which is the direction in writing referred to in the indictment, and is in the following terms :

48, Tanner-street, Bermondsey, 25th Feb. 1890.—Mr. J. Bowerman.—Dear Sir,—In accordance with our interview with you, we agree to enter into an arrangement with you in connection with bills of exchange by drawing upon us at four months gradually to the amount of 5000*l.* and endeavour to discount the same at a moderate rate of interest, but in no event is the rate to exceed $7\frac{1}{2}$ per cent. on the 80 per cent. (to be paid us on the proceeds of the bills), or 2 per cent. over Bank of England rate to be charged us and half stamps as usual. The bills to be kept renewed for a period of three years, and when eventually paid off by us we undertake to provide the 80 per cent. proportion.—Yours truly, **TEBBITT BROTHERS.** P.S.—We have accepted for you five bills to the amount of 400*l.*, 400*l.*, 290*l.* 17*s.* 6*d.*, 395*l.* 16*s.* 8*d.*, 400*l.* Total, 1886*l.* 14*s.* 2*d.*—**T. BROTHERS.**

And a similar document was signed by the prisoner and handed to Mr. Tebbitt.

The prisoner then produced five stamped bill forms and drew five bills of exchange addressed to Messrs. Tebbitt Brothers for sums amounting together to 1886*l.* 14*s.* 2*d.*, and including amongst them the two bills referred to in the indictments, He handed them to Messrs. Tebbitt for acceptance, and they accepted them and handed them back to the prisoner, who signed a memorandum at the foot of the document above referred to as having been handed to Mr. Tebbitt, that he had received those acceptances on account in pursuance of the arrangement, and also a memorandum as follows: "In the event of my not discounting the said bills, I agree to return them to you cancelled within three days.—F. B." At the time these bills were handed to the prisoner the drawer's name was left blank, but the bills were in all other respects complete. The prisoner afterwards handed the two bills referred to in the indictment to Mr. L. Berg, and requested him to discount them. When they were handed to him no drawer's name was upon them, and the prisoner requested Mr. Berg to sign as drawer, which he did. Mr. Berg got those bills discounted, and handed the prisoner the amount of the discount less his commission, and the prisoner, in violation of good faith, converted that sum to his own use.

At the close of the case for the prosecution the counsel for the

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defence submitted that there was no case to go to the jury on the following grounds :

1. That the prisoner was neither a broker nor an agent within the meaning of the 75th section of 24 & 25 Vict. c. 96. He contended there was no evidence that the prisoner carried on the business or occupation of a broker or agent, and that according to the evidence it must be presumed he was not in any business, but that, seeing the prosecutor's advertisement, he volunteered to get the bills discounted. 2. That the prisoner never was intrusted with any securities by the prosecutor. He contended that the prosecutor never had any property in the document. The paper and stamps belonged to the prisoner, and the bill when drawn was his property. It was not a security for the payment of money while in the hands of the prosecutor, because the acceptance was not complete until delivery. At the time the documents referred to in the indictments as securities for the payment of money and bills of exchange were intrusted to the defendant they did not come within any of those descriptions.

On behalf of the prosecution it was contended that upon the evidence it was clear the prisoner was a broker or agent within the meaning of the statute, and had so represented himself. That as soon as the prosecutor wrote his acceptances on the bills and delivered them to the defendant, the latter was intrusted with a security for the payment of money within the meaning of the statute. That the question was not whether the document was a bill of exchange at the time it was handed to the prisoner, but whether he was intrusted with a bill of exchange or an acceptance of a bill of exchange. That the document was delivered to him with authority to complete it, and for the express purpose that he should complete it as a bill of exchange, and he had, in accordance with that authority, made it a complete instrument before converting it to his own use. That in any case the document, when handed to him, was under the circumstances a security for the payment of money.

I decided to reserve all the points raised for the determination of this court, and to leave the case to the jury.

The prisoner was found guilty on each of the first eight counts of the indictment, and I respited judgment until after the decision of the court on this case, but, under the special circumstances, directed that the prisoner should in the meantime remain in gaol.

The question for the court is, whether upon the facts before set out, the prisoner could be properly convicted on any of the first eight counts of the indictment.

By 24 & 25 Vict. c. 96, s. 75, it is enacted that

Whosoever, having been intrusted, either solely or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any money or security for the payment of money, with any direction in writing to apply, pay, or deliver such money or security, or any part thereof respectively, or the proceeds or any part of the proceeds of such security for any purpose, or to any person specified in such direction, shall, in violation of good faith, and contrary to the terms of such direction, in any-

wise convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such money, security or proceeds, or any part thereof respectively . . . shall be guilty of a misdemeanour.

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Poland, Q.C. (with him *W. A. Metcalfe*), on behalf of the prisoner contended that the document which was the subject of the indictment was not a security for the payment of money at the time when it was handed to the prisoner, inasmuch as it was an inchoate document, being without any drawer's name. It could not be a bill of exchange, since a bill of exchange is not such until the drawer's name is put upon it, nor, for the same reason, could it be an acceptance of a bill of exchange. [HAWKINS, J.—Why is this not an acceptance of a bill of exchange within sect. 18 of the Bills of Exchange Act 1882?] It is submitted that the provisions of that section are intended to enable a bill when it is signed by the drawer to be sued upon, although it was accepted before his name was on it. In *Reg. v. Harper* (44 L. T. Rep. N. S. 615; 14 Cox C. C. 574; 7 Q. B. Div. 78; 50 L. J. 90, M.C.) it was held that a person who signed a fictitious name as indorsee on what purported to be a bill of exchange accepted by him could not be convicted of forging an indorsement on a bill of exchange, as no drawer's name was ever placed on the document. Again, in *Rex v. Hart* (6 C. & P. 106), where the prosecutor had applied to the prisoner to raise money for him, and the prisoner had undertaken to procure 5000*l.*, and had produced from his pocket-book blank bill stamps, across each of which the prosecutor wrote "Accepted payable at Messrs. Praed's, 189, Fleet-street, London," and signed his name, it was held that the stamps with the acceptances were neither bills of exchange, orders for the payment of money, nor securities for money at the time they were handed to the prisoner, inasmuch as at that time there was no name of any drawer upon them. In *Stoessiger v. The South-Eastern Railway Company* (23 L. T. O. S. 65; 3 E. & B. 549; 2 W. R. 375; 18 Jur. 605) a document which was in all respects like a bill of exchange, except that it had no drawer's name on it, was held not to be a bill, order, note, or security for payment of money, within sect. 1 of the Carriers Act (11 Geo. 4 & 1 Will. 4, c. 68). Lastly, in *M'Call v. Taylor* (12 L. T. Rep. N. S. 461; 34 L. J. 365, C. P.) an instrument in the form of a bill of exchange, addressed to and accepted by the defendant, but without the names of either a payee or drawer, was held to be neither a bill of exchange nor a promissory note, but only an inchoate instrument. In support of the contention that the prisoner was not a broker or agent he cited *Reg. v. Portugal* (16 Q. B. Div. 487).

Avory, for the prosecution, was not called on.

DENMAN, J.—With regard to the first point, namely, whether these were securities for the payment of money, we think that there was upon the evidence very good ground for finding them to be so. The contention was that they could not be securities for the payment of money because they were not such at the time

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the prisoner was entrusted with them; and we assent to that contention to this extent, that at the time of the documents being entrusted to the prisoner it was necessary that they should have been securities for the payment of money. Now, what was the condition of the documents at the time they were delivered to the prisoner? They were stamped and signed by Messrs. Tebbitt as accepting them, and all that was wanting was the signature of the drawer, whose name was left blank. In all other respects the bills were complete, and it appears to me that the case is really covered by the 18th section of the Bills of Exchange Act 1882. That section lays it down that a bill of exchange may be accepted before it is drawn, and that it is to be considered as an acceptance even before it is drawn. Now, nothing remained in the present case to be done except the signature of the drawer, and the bills were used for the purposes of fraud. Every one of the cases which have been cited is distinguishable from the present case. In *Reg v. Harper (ubi sup.)* the offence was not made out because an indorsement was required before the bill could be perfected, and there never was such indorsement, and the question therefore never arose whether it was a valuable security within the meaning of the present statute. In *Reg v. Hart (ubi sup.)* there was a very good ground upon which all the learned judges relied, namely, that the document there was not at the time a security for anything, because there was no sum filled in, and when people talk of a document as being a security for money, they do not mean in ordinary parlance a document which is security for any conceivable amount for which it may be filled in. No amount was filled in, and great stress was laid upon that fact by the learned judges who decided the case, and it must be looked on as only an authority to that extent. The next case is *Stoessiger v. The South-Eastern Railway Company (ubi sup.)*. There the document had never reached the hands of the drawer at all, and I think that is fatal to it. In *M'Call v. Taylor (ubi sup.)* the instrument was not even dated, so that it could be no security for the payment of any money to anyone, not being payable on demand even. Then we come to the Bills of Exchange Act, 1882, and it is contended on that that this could not be an acceptance, because the name of the drawer is not filled in. But I think that sect. 18 disposes of that argument. It enacts that "a bill of exchange may be accepted before it has been signed by the drawer, or while otherwise incomplete." What does that mean? Why, that there may be an acceptance. The moment the bill is in the hands of the defendant, he is able to make it available, and it is therefore, in my opinion, a paper which is of value to him. I think it is a security for the payment of money of which he availed himself when he converted it to his own use improperly. Another point taken is that he was not a broker or agent, and there are cases which run fine on that point undoubtedly. The only question, however, is whether there was reasonable evidence here of it, if it was a question for the jury. The prisoner began

by calling himself a broker, and he took the documents for the purpose of getting them discounted; he got them discounted, and then he converted the proceeds to his own use. I think that there can be no doubt that there was evidence of his being a broker; and I also think that upon this point the verdict of the jury was required. In my opinion, therefore, this conviction should be sustained.

POLLOCK, B.—I was not without some doubt on both the points which have been argued. As to the first, it is no question of whether this is a bill of exchange or not. The only question is whether it is a valuable security for money. It is clearly a security for money in which the person to whom it was given would put faith, and that disposes of the first point. As to the second point, whether the prisoner, being something more than a mere broker and having an interest in the matter beyond that of a mere agent, was a broker and agent within the meaning of the statute, that fact does not appear to me to deprive him of the capacity of broker and agent, and I entirely concur with what my learned brother has said on that point.

HAWKINS, J.—I am of the same opinion. The prisoner is charged with having been intrusted as a broker and agent with certain securities for the payment of money, and having as such broker and agent converted such securities to his own use and benefit contrary to the terms of the direction in writing with which they were intrusted to him, and the question is whether the documents intrusted to him were securities for the payment of money at the time they were so intrusted. When one comes to look at this particular transaction it seems to me that the view that they were securities for the payment of money is strongly confirmed. It is found in the case that the arrangement was that the bills of exchange were to be drawn by the prisoner himself, and that in pursuance of that arrangement he got the bill stamps and drew the bills addressed to Messrs. Tebbitt Brothers, and handed them to Messrs. Tebbitt for acceptance, who accepted them precisely according to the terms of the arrangement, and handed them back to the prisoner in the very way in which it had been arranged, and at any moment the prisoner could make them valuable securities. If, under those circumstances, these were not valuable securities, my notion of what is a valuable security is a very wrong one. It might just as well be said that an undorsed cheque deposited by the man in whose favour it is drawn with his bank is not a valuable security, which undoubtedly it is, simply because the indorsement was not on it at the time it left the drawer's hand. Then, when you come to look at the question whether the prisoner was a broker and agent, I entertain as little doubt. He introduced himself to the prosecutors in consequence of this advertisement, and he describes himself as a bill broker. Now, that is some evidence against him. Then he was an agent in every sense of the word to get these bills discounted; except in the character of an agent they would not

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have been handed to him. He was to endeavour to get them discounted, and in the event of his not doing so he was to return them to Messrs. Tebbitt. There is evidence therefore of his being both broker and agent; and with regard to the other question, whether these bills of exchange were securities for the payment of money, I am of opinion that they were, and that this conviction must therefore be confirmed.

STEPHEN and CHARLES, JJ., were of the same opinion.

Conviction affirmed.

Solicitor for the prosecution, *The Solicitor to the Treasury.*

Solicitors for the prisoner, *Norris and Son.*

HOUSE OF LORDS.

July 11, 12, 15, 16, 1889; May 19, 20, 22, and Aug. 5, 1890.

[Before the LORD CHANCELLOR (Halsbury), Lords WATSON, BRAMWELL, HERSHELL, MACNAGHTEN, MORRIS, and FIELD.]

BELL COX v. HAKES AND LORD PENZANCE. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Practice—Habeas corpus—Right of appeal—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 19.

Sect. 19 of the Judicature Act, 1873, gives no right of appeal from an order of the High Court of Justice granting a habeas corpus and discharging the prisoner.

Judgment of the court below reversed, Lords Morris and Field dissenting.

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Bowen, and Fry, L.JJ.), reported in 58 L. T. Rep. N. S. 323, and 20 Q. B. Div. 1, who had reversed an order of the Queen's Bench Division (Lord Coleridge, C.J. and Smith, J.) reported in 19 Q. B. Div. 307. The facts of the case were as follows:—

The appellant was a clerk in holy orders, and was the incumbent of St. Margaret, Toxteth-park, in the city and diocese of Liverpool and Province of York, and the respondent Lord Penzance was the official principal of the Chancery Court of York; the respondent Hakes was the promoter of the office of the judge.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

There were three questions raised by the appeal: first, whether any appeal lies to the Court of Appeal from an order of the Queen's Bench Division made upon an application for a *habeas corpus*, by which order a prisoner is discharged out of custody; secondly, whether a writ *de contumace capiendo* under the statute 53 Geo. 3, c. 127, can be lawfully issued to enforce obedience to an order which has expired; thirdly, whether a party can be pronounced contumacious in order to the issue of such writ, and thereupon be lawfully taken into custody when such pronouncing is not effected by the judge whose order or decree has not been obeyed, but by the deputy or surrogate of such judge, or when, in the alternative, such pronouncing is effected by the deputy or surrogate acting ministerially, purporting to hold a court, and reading at such court a judgment which has been sent down to him by the judge, such judge not being present at the court and not being within the territorial ambit of his jurisdiction when the party was pronounced contumacious.

The suit began in the following manner:—In January, 1885, proceedings under the Church Discipline Act were commenced by the respondent Hakes making a complaint against the appellant to the Bishop of Liverpool in respect of certain alleged ecclesiastical offences. The Bishop of Liverpool sent the case, by letters of request, to Lord Penzance, the judge of the Chancery Court of York, the Court of Appeal of the province, to be there heard and determined. The appellant was cited to appear, but never did appear in the court or suit.

On the 31st day of July, 1885, Lord Penzance, sitting at York, heard the case and decreed a monition admonishing the appellant to refrain from committing the alleged offences in the future.

In October, 1885, the appellant was served with a notice that he had disobeyed the monition, and some proceedings were taken thereupon by the respondent Hakes, but were afterwards abandoned and became abortive.

In February, 1886, the appellant was served with a further notice that he had disobeyed the monition, and that an application would be made to the court in respect of such disobedience.

On the 11th day of March, 1886, the case came on again at York before the Rev. Edward Aldous Lane, a surrogate, who, after hearing the proctor for the respondent Hakes, and the evidence he adduced, adjourned the case.

On the 8th day of April, 1886, the Rev. Edward Aldous Lane read as his own a judgment of the learned judge, purporting to find that the appellant had disobeyed the monition of the 31st day of July, 1885, and to decree a suspension for six calendar months, and a further monition to refrain. An instrument of suspension and a monition were thereupon issued from the registry of the court, and served upon the applicant and published on the 13th day of June, 1886.

On the 10th day of July, 1886, the appellant was served with

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a notice and an affidavit that he had disobeyed the suspension and had thereby been guilty of contumacy, and that in respect of such disobedience the court would be moved to enforce obedience to the suspension.

On the 30th day of July, 1886, the Rev. Edward Aldous Lane heard the application, found that the appellant had so disobeyed, and ordered the disobedience to be signified, having, as he stated in an affidavit, received before the case came on for hearing, directions from the learned judge so to do in the event of the appellant not appearing. It was proved that neither when the decree of suspension was made or issued from the registry, nor when the appellant was pronounced contumacious and the *significavit* was decreed, was Lord Penzance himself within the province of York or within the ambit of his jurisdiction as judge of the Chancery Court of York.

On the 5th day of August, 1886, a *significavit* was issued out of the Chancery Court of York under the seal of the Consistory Court of the Archbishop of York, and signed by the registrar of the court, and the *significavit*, together with a transcript or copy thereof and a writ of *mittimus*, with a *præcipe* for the issue of the *mittimus*, were on the 7th day of August lodged at the Petty Bag Office, Rolls-yard, to be sealed and transmitted to the Duchy of Lancaster.

On the 5th day of August, 1886, the appellant obtained from the Queen's Bench Division of the High Court of Justice a rule *nisi* for a writ of prohibition against further proceeding in the suit, addressed to the respondents, the prosecutor and Lord Penzance, the registrar of the court, and the surrogate. The rule was obtained and supported mainly on the grounds that if the orders were the orders of Lord Penzance then that he had acted without, or in excess of his jurisdiction in making the orders for suspension, monition, and *significavit* when he was not within the province of York, and without hearing the applications in court, but, that if they were the orders of the surrogate, then that the surrogate had no power to make them. The rule was, however, discharged after argument on the eleventh day of March, 1887. The appellant appealed to the Court of Appeal against the discharge of the rule *nisi*, but his appeal was on the 28th day of April, 1887, dismissed. On the same day the respondents took steps to have a writ *de contumace capiendo*, signed by the Vice-Chancellor of the County Palatine of Lancaster, issued from his office and delivered to the sheriff. On the 4th day of May, 1887, the appellant was arrested and imprisoned in Walton gaol. On the 16th day of May, 1887, the appellant obtained from the Queen's Bench Division a rule *nisi* for a writ of *habeas corpus* with a view to his discharge from custody. The application was made and the rule was supported mainly on the following grounds: first, that the order for disobedience of which the appellant had been declared contumacious had expired before the date of the issue of the writ *de contumace*

capiendo—that is, on the 13th day of December, 1886—that such writ could only issue in strict compliance with the Act of 53 Geo. 3, c. 127, which Act provided every person imprisoned thereunder with the means of terminating the imprisonment, that none of those statutory methods were open to the appellant, and that under the Act he could never regain his liberty; and, secondly, that the surrogate had no power under the Act or otherwise to pronounce the appellant in contempt.

On the 20th day of May, 1887, after argument on behalf of the respondents, the Court made the rule absolute, and ordered the immediate discharge of the appellant, who was released on the following day, the appellant undertaking by his counsel to bring no action against the gaoler. The respondent Hakes appealed, but the respondent Lord Penzance did not join in the appeal, from the order of the Queen's Bench Division to the Court of Appeal, which on the 21st day of November allowed the appeal with costs of the appeal, and set aside the order of the Queen's Bench Division.

Mr. Bell Cox appealed.

July 11, 12, 15, and 16, 1889.—The appeal came on for argument before the Lord Chancellor (Halsbury) Lords Fitzgerald, Herschell and Macnaghten.

Sir H. Davey, Q.C., Sir W. Phillimore, and Hansell appeared for the appellant.

Jeune, Q.C. and Danckwerts for the respondent Hakes.

The Solicitor-General (Sir E. Clarke, Q.C.) and R. S. Wright for Lord Penzance.

At the conclusion of the arguments, their Lordships took time to consider their judgment.

On the 6th day of October, 1869, before the House had given judgment, Lord Fitzgerald died.

May 19, 20, and 22, 1890.—The appeal was directed to be re-argued before the Lord Chancellor (Halsbury), Lords Watson, Bramwell, Herschell, Macnaghten, Morris, and Field, upon the question whether, in the circumstances of the case, an appeal lay at all from the Queen's Bench Division to the Court of Appeal.

Sir W. Phillimore and Hansell (Sir H. Davey, Q.C. with them), for the appellant, argued that no appeal lay to the Court of Appeal at all from an order granting a *habeas corpus* and discharging the prisoner: *Ex parte Woodhall* (59 L. T. Rep. N. S. 841; 20 Q. B. Div. 832); *Reg. v. Barnardo* (61 L. T. Rep. N. S. 547; 23 Q. B. Div. 305); *O'Shea v. O'Shea* (62 L. T. Rep. N. S. 713; 15 Q. B. Div. 59). The jurisdiction of the Court of Appeal is defined by sect. 18 of the Judicature Act of 1873. It has no original jurisdiction to discharge a prisoner. It can only do what the court below ought to have done, and that court had no power to reverse the order of release. The fact that the order of the Court of Appeal could have no effect, goes far to show that there is no appeal. See also *Swinfen v. Swinfen* (1 C. B. N. S. 364). Secondly, this is a criminal

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matter, and therefore there is no appeal, by sect. 47 of the Judicature Act of 1873. Thirdly, Mr. Hakes has no *locus standi* to entitle him to appeal. He was not aggrieved by the order of the Queen's Bench Division, and no order for costs could have been made against him so as to give him a ground for going to the Court of Appeal. As to costs see *Dodd's case* (2 De G. & J. 510).

Jeune, Q.C. and Danckwerts, for the respondent Hakes, contended that the effect of sect. 19 of the Judicature Act of 1873 was to give the Court of Appeal power to hear an appeal in all cases of *habeas corpus*, whether granted or refused. The section is clear and unambiguous, and gives an appeal from every order, except in certain specified cases of which *habeas corpus* is not one. See *Overseers of Walsall v. London and North-Western Railway Company*, 39 L. T. Rep. N. S. 453; 4 App. Cas. 30, per Lord Cairns, L.C.; *Enraght's case*, 43 L. T. Rep. N. S. 769; 6 Q. B. Div. 376; *Green v. Lord Penzance*, 45 L. T. Rep. N. S. 353; 6 App. Cas. 657; *Reg. v. Barnardo* (1), 61 L. T. Rep. N. S. 547; 23 Q. B. Div. 305; *Reg. v. Barnardo* (2), 24 Q. B. Div. 283; *Needham v. Needham*, 1 Phillips, 640. Orders granting *habeas corpus* have been reversed by the Judicial Committee of the Privy Council on appeals from the Colonial courts: *Attorney-General of Hong Kong v. Kwok-a-Sing*, 29 L. T. Rep. N. S. 114; L. Rep. 5 P. C. 179; *Reg. v. Mount*, 32 L. T. Rep. N. S. 279; L. Rep. 6 P. C. 283. The Crown Office rule of 1886, under which the Queen's Bench Division assumed to act in discharging the prisoner without having him before them, was *ultra vires*. [The LORD CHANCELLOR referred to *Carus Wilson's case*, 7 Q. B. 984.] It may have been intended by the Judicature Acts to assimilate the practice in the prerogative writs of *mandamus*, prohibition, and *habeas corpus*, making an appeal in all cases, which there was not before. The Court of Appeal has powers beyond those of the High Court, and it is not clear that, even before the Judicature Acts, there was no power of re-arrest if the discharge was improperly granted (see *Dugdale's case*, 2 E. & B. 129), and an analogous power may exist in this case. If the intention had been to make *habeas corpus* an exception to the general rules as to appeals, it would have been plainly stated. The giving of an absolute power of appeal to the Court of Appeal necessarily gives power to the inferior court to carry out the result of the appeal. See *Rodger v. Comptoir d'Escompte*, 24 L. T. Rep. N. S. 111; L. Rep. 3 P. C. 465. Order LVIII., r. 4, must be read with sect. 19 of the Judicature Act (see *Toulmin v. Millar*, 17 Q. B. Div. 603), though that decision was doubted in the House of Lords (58 L. T. Rep. N. S. 96; 12 App. Cas. 746). The Court of Appeal are not asked to make an order of re-committal, but only to discharge the rule. The prisoner could be retaken on the existing writ. The absence of power to enforce the order of the Court of Appeal, supposing it to be so, is no argument against the power of that court to hear the appeal: See *Reg. v.*

Ball, 6 Mod. 78. The statute 31 Car. 2, c. 2, only relates to criminal matters: *Cobbett v. Slowman*, 4 Exch. 747; 9 Exch. 683. The declaration of the Court of Appeal, if it does no more protects the gaoler against an action for false imprisonment. Where a court has made an error in the main decision, a party is entitled to get it set aside in order to get his costs, though the reversal may have no further effect: *Yeo v. Tatem*, 24 L. T. Rep. N. S. 918; L. Rep. 3 P. C. 692; *Bourgoign v. Chemin de Fer de Montréal*, 42 L. T. Rep. N. S. 414; 5 App. Cas. 381; *Witt v. Corcoran*, 34 L. T. Rep. N. S. 550; 2 Ch. Div. 69; *Great Western Railway v. Swindon Railway Company*, 51 L. T. Rep. N. S. 798; 9 App. Cas. 787. In *Dodd's case* (*ubi sup.*) there was no rule nisi. See also *Ex parte Child*, 15 C. B. 238; *Re Cobbett*, 14 M. & W. 175; *Pringle v. Secretary of State for India*, 60 L. T. Rep. N. S. 796; 40 Ch. Div. 288; *Crawcour v. Salter*, 30 W. R. 329. Secondly, this is not a criminal proceeding within sect. 47 of the Judicature Act, 1873. [They were stopped on this point.] Thirdly, Hakes has an interest entitling him to appeal. He is a party by order of the court, and has a technical and a real interest.

The *Solicitor-General* (Sir E. Clarke, Q.C.) and *R. S. Wright*, who appeared for Lord Penzance, took no part in the argument. Sir *W. Phillimore* was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Aug. 5.—Their Lordships gave judgment as follows:

The LORD CHANCELLOR (Halsbury).—My Lords: Probably no more important or serious question has ever come before your Lordship's House. For a period extending as far back as our legal history the writ of *habeas corpus* has been regarded as one of the most important safeguards of the liberty of the subject. If, upon the return to that writ, it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody. If release was refused a person detained might, according to *Ex parte Partington* (13 M. & W. 679), make a fresh application to every judge or every court in turn, and each court or judge was bound to consider the question independently, and not to be influenced by the previous decisions refusing discharge. If discharge followed, the legality of that discharge could never be brought in question. No writ of error or demurrer was allowed: (*City of London case*, 8 Rep. 121.) In days of technical pleading no informality was allowed to prevent the substantial question of the right of the subject to his liberty being heard and determined. The right to an instant determination as to the lawfulness of an existing imprisonment and the twofold quality of such a determination that, if favourable to liberty, it was without appeal, and if unfavourable it might be renewed until each jurisdiction had been exhausted, have from time to time been pointed out by judges as securing in a marked and exceptional manner the

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personal freedom of the subject. It was not a proceeding in a suit, but was a summary application by the person detained. No other party to the proceeding was necessarily before or represented before the judge except the person detaining, and that person only because he had the custody of the applicant, and was bound to bring him before the judge to explain and justify, if he could, the fact of imprisonment. It was, as Lord Coke described it, *festinum remedium*. The Act of Charles II., commonly called the Habeas Corpus Act, did but provide remedies and penalties to enforce the known state of the law and to prevent its evasion. It was confined to criminal cases or alleged criminal cases, and provided that except in cases of treason and felony plainly expressed upon the face of the warrant its strongest provision should have operation. But the Act 56 Geo. 3, c. 100, supplied the omission to provide for cases where the cause of detention was neither crime or debt. The preamble of the Act recites both the efficiency and quickness of the remedy in these words: "Whereas the writ of *habeas corpus* hath been found by experience to be an expeditious and effectual method of restoring any person to his liberty who hath been unjustly deprived thereof; and whereas extending the remedy of such writ and enforcing obedience thereunto and preventing delays in the execution thereof will be advantageous to the public; and whereas the provisions made by an Act passed in England in the thirty-first year of King Charles the Second, intituled 'An Act for the better securing the liberty of the subject, and for prevention of imprisonment beyond the seas,' and also by an Act passed in Ireland in the twenty-first and twenty-second years of his present Majesty, intituled 'An Act for the better securing the liberty of the subject,' only extend to cases of commitment or detainer for criminal or supposed criminal matter,—Be it therefore enacted, &c. . . . That where any person shall be confined or restrained of his or her liberty (otherwise than for some criminal or supposed criminal matter, and except persons imprisoned for debt or by process in any civil suit) within that part of Great Britain called England, dominion of Wales, or town of Berwick-upon-Tweed, or the isles of Jersey, Guernsey, or Man, it shall and may be lawful for any one of the barons of the Exchequer of the degree of the coif, as well as for any one of the justices of one bench or the other, and where any person shall be so confined in Ireland it shall and may be lawful for any one of the barons of the Exchequer, or the justices of one bench or the other in Ireland, and they are hereby required, upon complaint made to them . . ." Then follow the provisions with which we are familiar. The Act proceeds thus: "And be it further enacted by the authority aforesaid that in all cases provided for by this Act, although the return to any writ of *habeas corpus* shall be good and sufficient in law, it shall be lawful for the justice or baron before whom such writ may be returnable to proceed and examine into the truth of the facts set

forth in such return by affidavit or by affirmation (in cases where an affirmation is allowed by law) and to do therein as to justice shall appertain; and if such writ shall be returned before any one of the said justices or barons, and it shall appear doubtful to him, on such examination, whether the material facts set forth in the said return or any of them be true or not, in such case it shall and may be lawful for the said justice or baron to let to bail the said person so confined or restrained, upon his or her entering into a recognisance with one or more sureties, or in case of infancy or coverture or other disability, upon security by recognisance in a reasonable sum to appear in the court of which the said justice or baron shall be a justice or baron upon a day certain in the term following, and so from day to day as the court shall require, and to abide such order as the court shall make in and concerning the premises; and such justice or baron shall transmit into the same court the said writ and return together with such recognisances, affidavits, and affirmations; and thereupon it shall be lawful for the said court to proceed to examine into the truth of the facts set forth in the return in a summary way by affidavit or affirmation (in cases where by law affirmation is allowed), and to order and determine touching the discharging, bailing, or remanding the party." It will be observed that the judge is to satisfy himself, and if he is satisfied that the matter returned is matter which, if true, would be a good return, he is to do what justice requires—i.e., if he thinks the imprisonment lawful to remand to custody; if otherwise, to enforce the immediate liberation. If, on the other hand, he is doubtful, he may hold to bail. The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom. I have insisted at some length upon the peculiarities of the procedure, because I think one cannot suppose that the Legislature intended to alter all the procedure by mere general words, without any specific provision as to the practice under the writ of *habeas corpus* or the statutes which from time to time have regulated both its issue and its consequences. I do not deny that the words of sect. 19 literally construed are sufficient to comprehend the case of an order of discharge made upon an application for discharge upon a writ of *habeas corpus*; but it is impossible to contend that the mere fact of a general word being used in a statute precluded all inquiry into the object of the statute, or the mischief which it was intended to remedy. In the great case of *Stradling v. Morgan* (1 Plow. 198 B) the Court of Exchequer Chamber was called upon after verdict to construe the statute upon which the action was brought, and which used the words "any treasurer, receiver, or minister accountant," and the Court held that, however wide the words, the statute must be taken not to have meant to use the words in their absolute generality, and yet all agreed that the receiver in question was within the words of the statute. In the argument and the judgment illustrations are given of the

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principle upon which statutes ought to be expounded, which have many times since been referred to as satisfactory in reason and common sense. Thus the word "presently" answer to the creditor—i.e., immediately in a statute—has been construed to mean not that the extenders shall immediately pay but immediately become debtors. The word "no writ shall abate by exception of non-tenure of parcel but for the quantity of the non-tenure which is alleged," was held to mean only some writs shall not abate, which determination is quite contrary, it is said, to the text. So the Statute of Marlbridge enacts that "none from henceforth shall cause any distress that he has taken to be driven out of the county where it was taken," and says, further, "if the lord presume to do so against his tenant he shall be grievously punished by amercement." Yet in 1 Henry 6 it was held that "if one had a manor in one county, and a person holds lands which he has in another county of this manor, that it was lawful for a lord to distrain for the services and to carry the distress to the manor into the other county where the manor is, notwithstanding the said statute. And yet it seems contrary to the letter of the Act, as it is, in truth, contrary to the generality of the letter of the Act. But the judges have expounded the intent of the makers of that Act not to extend to the lord, but where the seignior and tenancy are in the same county. So that by such exposition made according to the intent of the Act the generality of the words is abridged." From these and similar examples a canon of construction has been arrived at which has often been quoted, but which is so important with reference to the question now before your Lordships that I quote it once again: "From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded on the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion." If the Judicature Acts are looked at by the light of such principles as are here indicated, I cannot conceive it to be possible that the framers of those Acts had in their minds the dealing with such an important branch of the law of this country by the use of one word, the necessity for the use of which is amply satisfied by the other provisions of the Acts in question. It was the known and well-settled state of the law that a dis-

charge under a writ of *habeas corpus* was final, and the Act from which I have quoted in the latter part of the 3rd section calls upon the court to "order and determine touching the discharge of the party detained." Undoubtedly the construction of these words would have been, according to the then known course of the law, a final and absolute discharge, and if it had been expressed in words the Judicature Acts could not have dealt with such a discharge without repealing the statute. Neither of the statutes 31 Car. 2, nor 56 Geo. 3, is referred to in the voluminous schedules of those Acts, and I am brought to the conclusion that they were intended to deal with the cases of hostile litigants, each representing a personal interest, and without hearing or giving an opportunity to be heard, it would be impossible for the High Court to adjudicate. This is a proceeding on the part of the court itself examining the lawfulness of the imprisonment for itself, and though it may, it is not bound to do more than satisfy itself of the lawfulness or unlawfulness of an imprisonment. It is upon this part of the case that I think the absence of a proper appellant is important. I admit at once that if I were to assume an appeal it would be easy to find a person who might appropriately represent the interests of those who authorise the imprisonment. The original complainant, the judge, or even the gaoler, might properly fill that character; but when the nature of the transaction is such that there is no one whom the court would be bound *ex debito justitiæ* to hear, I think it reflects some light upon the nature of the proceeding, and whether the court must regard it as a proceeding in which there cannot be a right of appeal, it can hardly be disputed that no machinery is provided for giving effect to an appeal against a discharge under a writ of *habeas corpus*. Is it possible that the Legislature, intending to give an appeal for the first time, and upon a matter of such supreme constitutional importance, yet left the matter unprovided for? I cannot think so. The Court of Appeal, indeed, disregard this consideration as being immaterial, since they are of opinion that the appeal is certainly given, and that they are bound so to declare the law, whatever may be the consequences; but, though I quite agree with that proposition, if I am to assume an appeal certainly given, yet it surely is one mode of arriving at the intention of the Legislature to consider whether the machinery provided by the statute is appropriate to the alleged intention. The section under construction I think was framed with a view to the creating of a Court of Appeal, and giving the powers necessary for the exercise of the jurisdiction so created. If in the words themselves, or in the ancillary machinery to the exercise of the jurisdiction, it can be discovered that the Legislature did not intend the exercise of the jurisdiction in a particular case, it is no straining of the words to assume the limit which the Legislature has thus expressed by the limitation of the machinery. The case of *Kwok-a-Sing*, in the Privy Council (29 L. T. Rep. N. S. 114; L. Rep. 5 P.C. 179) appears to me to be entirely irrelevant.

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If it were an authority at all, it would only be relevant to show (what it was hardly contended could be shown) that an order of discharge under a writ of *habeas corpus* was always open to review, and independently of the Judicature Act. But in truth there are two grounds upon which that decision is intelligible. Apart from any practical determination of existing litigation, the Judicial Committee can do what the High Court cannot do—*i.e.* give advice upon abstract propositions of law. Secondly, it can advise the exercise of Her Majesty's prerogative with respect to the appeals from her colonial courts in matters where undoubtedly no appeal lies. Indeed, the particular discussion arose in that case upon a criminal charge, and the real point in debate was, whether a discharge before a court having no jurisdiction was a case under the provisions of the 31 Car. 2. In the case of *Reg. v. Mount* (32 L. T. Rep. N. S. 279; L. Rep. 6 P. C. 283) the Judicial Committee were giving an opinion as to the course to be pursued where in the particular colony no provision had been made for carrying out a sentence of penal servitude, although that question assumed the form of an appeal. But, as I have said, both these cases are irrelevant, or they prove too much, and when the relation to the colonies is borne in mind it is obvious that neither case can have any relevancy to the true construction of the 19th section of the Judicature Act. I am quite at a loss to understand what relation *Dugdale's case* has to the matter in hand. A misdemeanant convicted and sentenced gave bail in error, and by mistake was permitted to be at large, when, as afterwards turned out, he had not complied with the conditions under which alone he could have been permitted to be at large. The proceedings which released him were without jurisdiction, and the court having jurisdiction remanded him to custody. Technically, I think it was an escape, and he was recaptured to undergo his imprisonment on an existing judgment which had not been qualified or set aside, and the execution whereof had only been interrupted by mistake. It would be a very small point here to decide as to the costs for the purpose of founding jurisdiction; but I am of opinion that, if the court had no jurisdiction to entertain the appeal, they had no jurisdiction to award costs. I desire to express no opinion whether a new *significavit* can be followed by a new order of arrest; that is a question which does not now arise, and may hereafter arise, and I wish to keep myself quite free to decide that question when it shall arise. Whether it can or cannot does not seem to me to reflect any light upon the question now under debate. I entertain no doubt that the writ delivered to the sheriff is spent by the execution by the sheriff of the mandate therein contained, and certainly cannot be made the foundation for a fresh arrest, or for a detention which has once by lawful authority been declared to be unlawful. As to the power to retake it, it is enough to say that the sole authority which Mr. Jeune's industry and ability have been able to discover is impliedly an authority the

other way, inasmuch as the writ in the "Registrum Brevium" recites an unlawful deliverance from prison as the ground and foundation of the right to recapture. Except so far as may be inferred from what I have said as to the argument which would imply a repeal of the Habeas Corpus Act, I do not desire to express any opinion upon what the law would be if a refusal to discharge should be the subject of appeal. Upon the merits of this appeal I have of course formed no opinion. The preliminary point has alone been argued, and I will only say that, if it be true, as one of the parties contends, that there has been a disobedience to the law obstinate and persistent, I have no doubt that the law is or can be made strong enough to deal with it. But your Lordships are here determining a question which goes very far indeed beyond the merits of any particular case. It is the right of personal freedom in this country which is in debate, and I for one should be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed, and that the right of personal freedom is no longer to be determined summarily and finally, but is to be subject to the delay and uncertainty of ordinary litigation, so that the final determination upon that question may only be arrived at by the last Court of Appeal. For these reasons I move your Lordships that the judgment of the Court of Appeal be reversed.

Lord BRAMWELL.—My Lords: I think that this appeal should be allowed, on the ground that the Court of Appeal had no jurisdiction to entertain the appeal to them. That an appeal from the decision of a judge or court on the grant or refusal of a writ of *habeas corpus*, and on the adjudication on its return, would be reasonable, this case abundantly shows. I do not say so on account of the original question between the parties (the particulars of which are wholly unknown to me), but on account of the question which has resulted from the application for a writ of *habeas corpus*. A court of competent jurisdiction has decided that the appellant has broken the law, and has suspended him from the exercise of his functions as a priest. He has deliberately disobeyed the orders of the court, on no ground except that he chose to do so; he has been sent to prison for his contumacy. And the question, on the return to a writ of *habeas corpus*, for the Divisional Court and Court of Appeal was, whether that imprisonment was lawful or not; in other words, whether he was to be punished or go unpunished. This is a serious question, and there can be no doubt that out of proceedings on writs of *habeas corpus*, and on application for them, most serious questions may and do arise, much more important than the majority of those which are the subject of appeal. However, as has been said, we have got on without such appeals hitherto, and might continue to do so and thrive. I say without such appeals, for, with all respect, I cannot agree that going first to a judge of one court, and then, on being refused by the judge,

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going to a court, or, being refused by one court, going to another, was or is an appeal. The court applied to, after refusal by a judge or other court, was not exercising an appellate jurisdiction in entertaining the application. It was exercising a primary jurisdiction. It need not have heard of the former application, nor known of the materials on which it was founded; and, indeed, those before it might be different from the former. If, indeed, such a proceeding was an appeal, that appeal exists still. Clearly, where the first application is to a single judge, and where to the High Court, the Lord Chancellor could grant the writ refused by them on application to him, and *vice versa*. Whether, if one division of the High Court, before the Queen's Bench, Common Pleas, and Exchequer Division were fused, had refused the writ, then another division would have been bound to entertain an application for one, I know not. If yes, then the Judicature Act left the matter as it was before. Anyhow, there is the possibility of a second application now as of right, so that there is the less need for an express appeal to supply the want of being able to try more than one tribunal. The second application may be "improper" as Cotton, L.J. says, but it is one that may be made and must be entertained. Still the question is, has the Judicature Act provided such an appeal? That it has done so intentionally I think no one can suppose. It is impossible that if an appeal had been intended there should not have been some particular provisions as to its procedure up to and after the final order, and there are none. The very able and learned arguments of Mr. Jeune and Mr. Danckwerts have shown or suggested that in some cases, perhaps, a reversal of an order to discharge a person brought up on a writ of *habeas corpus* might leave him subject to proceedings for restoring him to custody; for instance, where a sentence is unexpired, and possibly Mr. Cox may in some way be got at, I do not know. But there are some cases where the discharge is of such a character that its effect cannot be undone. I say that the absence of specific procedure in the Judicature Act to enforce an order reversing an order of discharge on a writ of *habeas corpus*, and the possible futility of such a reversal, is a strong argument to show that an appeal does not lie. I cannot, with great submission, agree that the court may reverse, though no good may come of it. If no good may come of it eventually, I think the argument is strong to show that the power is not given. Of course, if the statute in express terms said the appeal should lie, it must be obeyed. But when the question is one of construction, surely it is a good argument to show that a particular construction would be futile. What is the substance of the appeal? I speak of where there is a discharge. There may be a writ without a previous rule *nisi*, or with one. It cannot be contended that an appeal will lie where there is a rule *nisi*, and not where there is not. Indeed, where there is a rule *nisi* on sufficient *prima facie* materials, and the body is brought up, or the matter is discussed

as though it were, it seems to me it would be wrong to discharge the rule *nisi* if there were an appeal, and the discharge was revoked. In this case the Queen's Bench Division made absolute the rule for a *habeas corpus*, and also ordered that the appellant should be discharged without being brought up. How can it be right to discharge the rule for the *habeas corpus*? What is the consequence? Does the bringing up of the body become unlawful, or would it have been if the writ had issued and the body been brought up? These considerations show that the substantial question is whether the order for the discharge of the body which is to be brought up, or treated as though brought up, was right. When there is an order of discharge I have a difficulty in seeing how a Court of Appeal can undo that order. The body is gone. The Court of Appeal cannot reverse what has been done. It cannot give the judgment that ought, if right, to have been given, viz., that he be remanded. He is not there. No doubt power could be given to it to remedy the error. But without express power it can do nothing. It does not issue the process from the Ecclesiastical Court, not the writ *de contumace recipiendo*, if there is one. As to the case of *Reg. v. Dugdale*, I do not understand it. I have no notion where the prisoner was or what was done with him. On these grounds I think an appeal was not intended. But then there are the words of the statute, "The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order of Her Majesty's High Court of Justice, or any judges or judge thereof." I have an indistinct misgiving whether in awarding or disposing of a writ of *habeas corpus* a judge of the High Court or the High Court itself is acting as a court or judge of a court of judicature. There is no *lis*; there is no action; these proceedings are entitled *ex parte*. No doubt sect. 16 transfers the power to grant writs of *habeas corpus*, but is that power a power of judicature? Sect. 19 speaks of a judgment or order, i.e., an order in the nature of a judgment. This is only a doubt; but further, I think the proper way of dealing with sect. 19 and sect. 18 is to consider their object to be to establish a Court of Appeal, not to make things appealable of a character not appealable before. The section begins, "The Court of Appeal shall have jurisdiction," &c. Sect. 18 transfers certain powers to it, in which are certainly not included the power of hearing an appeal from a decision as to a writ of *habeas corpus*. I do not say that appeals do not lie in cases where they did not before. I say that to give such appeals was not the object of sects. 18 and 19. But still further, though the words are there, though they comprehend in words the case of an appeal from a decision on the return of a writ of *habeas corpus*, yet, if the result would be futile, or lead to an absurdity, the right way of dealing with those words is to put a limit on them. As for instance thus, shall "have jurisdiction to hear appeals from any judgment or order appealable, or where the Court of Appeal,

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or the court appealed from, can execute the order of judgment of the Court of Appeal." I submit that this is perfectly legitimate. All judges who have had occasion to speak of it have unhesitatingly dealt in this way with sect. 38 of 30 & 31 Vict. c. 131. And see Maxwell on Statutes, 242, where many cases to the same effect are collected. On these grounds I think this judgment should be reversed. My reasons would, perhaps, apply to a case when the prisoner had been remanded, but I limit my opinion to where he has been discharged. Of course, I think that part of the order appealed from which orders payment of costs to Mr. Hakes, the appellant, in the Court of Appeal, should be reversed, as there was no jurisdiction to entertain the matter at all. Even if there was, I do not see why he should have costs from Mr. Cox. True, I think that Mr. Hakes was a proper appellant if there could be an appeal, though the question was not one between him and Mr. Cox. And that is one of the difficulties I feel as to whether there could be an appeal. Of course, it is right to give him an opportunity of being heard against the discharge and of informing the court as to the facts, but not him exclusively. Suppose he had died or left the parish? In the result I think the question is, Is there an appeal from an order discharging a person brought up on *habeas corpus*? That sects. 18 and 19 of the Judicature Act are directed to the establishment of a Court of Appeal, and not to making a matter the subject of appeal not formerly so, and different in kind and character from those previously the subject of appeal. That if an order of discharge is a judgment or order of judicature, and so within the very words of sect. 19, a limitation must be put on them excluding such appeals to avoid the futility, inconvenience, and incongruity which would otherwise result.

LORD HERSCHELL.—My Lords: The preliminary question argued upon the hearing of this appeal is one of great importance. It touches closely the liberty of the subject and the protection afforded by discharge from custody under a writ of *habeas corpus*. The law of this country has been very jealous of any infringement of personal liberty, and a great safeguard against it has been provided by the manner in which the courts have exercised their jurisdiction to discharge under a writ of *habeas corpus* those detained unlawfully in custody. It will be convenient, before proceeding to an examination of the section of the Judicature Act upon which this case turns, to state briefly the mode in which the courts have administered the law in relation to that writ. It was always open to an applicant for it, if defeated in one court, at once to renew his application to another. No court was bound by the view taken by any other, or felt itself obliged to follow the law laid down by it. Each court exercised its independent judgment upon the case, and determined for itself whether the return to the writ established that the detention of the applicant was in accordance with the law. A person detained in custody might thus proceed from court to court until he obtained

his liberty. And if he could succeed in convincing any one of the tribunals competent to issue the writ that he was entitled to be discharged, his right to his liberty could not afterwards be called in question. There was no power in any court to review or control the proceedings of the tribunal which discharged him. I need not dwell upon the security which was thus afforded against any unlawful imprisonment. It is sufficient to say that no person could be detained in custody if any one of the tribunals having power to issue the writ of *habeas corpus* was of opinion that the custody was unlawful. This was the state of the law at the time the Judicature Act was passed. If the contention of the respondent is to prevail, that statute has effected a grave constitutional change. The discharge from custody by a court of competent jurisdiction no longer avails to protect from further proceedings. The propriety of the discharge may be questioned in the Court of Appeal, and even if that court should concur with the court below an appeal would lie to your Lordships' House, so that, although the court of first instance and the Court of Appeal should concur in thinking the custody illegal, their decisions might be set aside by a majority of this House. It is not easy to exaggerate the magnitude of this change; nevertheless, it must be admitted that if the language of the Legislature, interpreted according to the recognised canons of construction, involves this result, your Lordships must frankly yield to it, even if you should be satisfied that it was not in the contemplation of the Legislature. Reliance is naturally placed by the respondent upon the broad general words of the 19th section: "The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order save as hereinafter mentioned, of Her Majesty's High Court of Justice." It cannot be denied that an order for the discharge of a person in custody such as was made in the present case is, *prima facie*, an order to which this section applies. It does not come within any of the exceptions to which reference is made in the section. It was, indeed, somewhat faintly argued by the learned counsel for the appellant that this was an appeal in "a criminal cause or matter" within the meaning of sect. 47. But, in my opinion, they failed to establish this proposition. And if there was nothing in the statute which could be appealed to as showing that the Legislature intended some further limitation to be put upon the general words used. I think it might be impossible to resist the respondent contention. But the section contains two clauses. That which confers the right of appeal and the jurisdiction to hear and determine it is immediately followed by a provision which is obviously intended to make the power of review complete and effectual by furnishing the means of enforcing it. The learned judges in the court below considered that it was quite immaterial to inquire what would be the effect of their judgment, or how it could be enforced. If an appeal were given in such a case as the present in specific terms, I should agree with them. It would then be their duty to entertain

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it and to pronounce their judgment, even if there were no means of compelling obedience to it. But the attention of the learned judges does not appear to have been drawn to the language of the second branch of the section, or to the bearing which it might have upon the construction to be put upon the earlier words. It cannot, I think, be denied that, for the purpose of construing the enactment, it is right to look not only at the provision immediately under construction but at any others found in connection with it, which may throw light upon it, and afford an indication that general words employed in it were not intended to be applied without some limitation. The enactment following the words which confer jurisdiction to hear and determine appeals gives to the Court of Appeal, for the purposes of the "enforcement of any judgment or order made on any such appeal," all the power, authority, and jurisdiction by the Act vested in the High Court of Justice. The first observation I have to make is this. I think it must be held that the Court of Appeal has no power to enforce its judgment beyond that which is here conferred. Even if it be conceded that, in the absence of any such provision, some authority to enforce its judgments might be implied, it would be contrary to sound principles of construction to extend by implication the express power given. The court, then, has the same power to enforce its judgments as the High Court, and is not empowered to use any further or other means. It appears to me, therefore, legitimate and relevant to inquire whether, in any particular class of cases, the Court of Appeal has been left powerless to enforce its orders in case its conclusion should differ from that arrived at by the court below. The case with which we have to deal is an order discharging a person from custody under a writ of *habeas corpus*. It was said, indeed, that the order of the Queen's Bench Division was twofold, and might be treated as two separate orders; first, to bring up the body of the applicant, and second, to discharge him from custody, I shall revert to this argument presently; but for the moment, I shall treat it simply as an order discharging from custody. Has the Court of Appeal any power effectually to review such an order, and to undo what was done by the court below? For the reasons I have already given I think this must be determined by the answer to the further question, Has the High Court any power to enforce an order for the arrest of a person at large, under such circumstances as the present, or in any like case? It needs no argument to prove that the High Court is destitute of any such power. It has inherited the combined powers of the courts whose functions were transferred to it, but none of these had any jurisdiction or authority to review a discharge by a competent court under a writ of *habeas corpus*, or to enforce the arrest of one thus freed from custody. And I need hardly add that they possessed no general power of arrest for the purpose of enforcing their judgments. It seems to me to follow that, however wrong the Court of Appeal might think a discharge to have

been, it would be powerless to order a re-arrest or, at least, to enforce such an order. Great reliance was placed upon the case of *R. v. Dugdale* (2 E. & B. 129), which it was said showed that the Court of Queen's Bench had the power to order the re-arrest and commitment to custody of a person improperly discharged. In that case the defendant had been convicted and sentenced to two years' imprisonment at the quarter sessions. He brought error on this judgment, which, however, was in part affirmed by the Queen's Bench, and, having been bailed pending the suit, he was remanded to custody. He then took the necessary steps to carry the writ to the Exchequer Chamber, and obtained his discharge by acknowledging recognisances before Platt, B. at chambers under 8 & 9 Vict. c. 68, and 9 & 10 Vict. c. 24. These recognisances, however, did not comply with the statutes, under which alone he was entitled to be out on bail pending the appeal. The discharge was, in fact, without jurisdiction. For the purpose of testing the question of jurisdiction a rule was obtained to show cause why he should not be again apprehended and recommitted to the custody of the keeper of the House of Correction, "in execution of the judgment in this prosecution." This rule was made absolute, but he was not arrested merely by virtue of this rule. A warrant was granted by Erle, J. for his recommitment, reciting the judgment and sentence, and stating the recommitment to be "in execution of the judgment in the said prosecution." The defendant in that case was at large during the currency of a valid sentence and judgment, having been set free pending an appeal by a learned judge acting without jurisdiction. I am unable to see the bearing of that case upon the present, or how it shows that when a prisoner has been discharged from custody under a writ of *habeas corpus* by a court of competent jurisdiction, there can be any power in the court to issue a warrant for his recommitment. The counsel for the respondent called attention to Order LVIII., r. 4, and insisted that this supplemented the power conferred on the Court of Appeal by the section under discussion. That order provides that the Court of Appeal shall have power to draw inferences of fact, and to give any judgment and make any order which ought to have been made, "and to make such further or other order as the case may require. It was these latter words which were relied on. I think it is a somewhat extravagant proposition that a rule such as this would enable the court to order the re-arrest of a person discharged under a writ of *habeas corpus*, and to enforce its order. I think it impossible to hold that it gave any such authority or enlarged the power to enforce its order which is vested in the Court of Appeal by the 19th section of the Act. It was argued, however, that it was unnecessary to empower the Court of Appeal to remit to custody a person erroneously discharged by the court below, seeing that as soon as the order of that court was reversed, the person discharged might again be arrested by the sheriff; and, indeed, that it would be

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his duty, upon receiving notice of the order of the Court of Appeal, so to arrest him. No authority was cited, nor could any precedent be appealed to in support of this proposition, and I find myself wholly unable to assent to it. Where the sheriff has taken the person named in the writ and handed him to the gaoler for custody under it, his duty is at an end, save in the case of an escape. And the suggestion that a discharge by a court of competent jurisdiction becomes, when its order is reversed by a Superior Court, equivalent to an escape will not bear examination. It was said that the writ commanded the sheriff to attach the body of the appellant "until he shall have made satisfaction for the contempt," and that no such satisfaction having been made, the writ was still in force and effectual to authorise his re-arrest. But the limitation, "unless he shall have been sooner discharged by a court of competent jurisdiction," must be applied in this case just as much as if the warrant had been to attach the person named for a definite term. Then it was said that the appellant might be arrested again, inasmuch as the sheriff had not yet notified to the justices how he had executed the precept. I am unable to follow this argument. In the present case the sheriff would make a true and sufficient return by stating that he had attached the appellant by his body, and delivered him to the gaoler for safe custody under the writ. And if he were to add that the prisoner had been discharged from custody by the High Court of Justice, the return would, in my opinion, none the less be good and sufficient. When the sheriff returns that he has not executed the writ, and that the party cannot be found within his bailiwick, the court is empowered by sects. 4, 5, 6, and 7 of the 5 Eliz. c. 23 (which by sect. 1 of the 53 Geo. 3, c. 127, is made applicable to writs *de contumace capiendo*) to award successive writs of *capias* with heavy pecuniary penalties until the person named in the writ has yielded his body to the gaol and prison of the sheriff. But when once he has yielded his body or been taken into custody, and has been discharged by a court of competent jurisdiction, I can find no authority for a subsequent arrest. Next, it was argued that he might be re-arrested under a writ *de contumace recapiendo*. But it is clear from the terms of that writ that it would be inapplicable to such a case as the present. Godolphin describes it as a writ whereby an excommunicated person who had been "unduly delivered" may be again committed to prison. The writ itself (as set out in "Registrum Brevium"), after stating that a complaint had been received from the bishop that the person named had been liberated from prison "in læsionem libertatis ecclesiasticæ et nostri contemptum manifestum," directed that they should be taken again "nisi modo legitimo a prisone prædicta deliberati fuerint." It is clear that a person discharged by a court of competent jurisdiction has been delivered *modo legitimo*, and not in contempt of the Sovereign. Finally, it was said that a new writ *de contumace*

capiendo might be issued under the *significavit*; but when a writ has been once issued in conformity with the provisions of the 53 Geo. 3, I am at a loss to understand what warrant there would be for issuing a second writ. The truth is, that if your Lordships were to hold that the person named in the writ could be arrested again, after his discharge by a competent court, on the ground that his custody was unlawful, you would not be declaring a law which has hitherto existed, but inventing a fresh power which has never yet, and, indeed, never could have been exercised, in order to meet the altered circumstances created by the jurisdiction which the Court of Appeal is alleged to possess. It may be that there could be another *significavit* in the ecclesiastical suit, followed by another writ of *de contumace capiendo*. But so there might have been before the Court of Appeal pronounced its judgment just as well as now. The utmost that can be said is, that if an application were made to the High Court for discharge from custody under that writ, the court would, in all probability, defer to the opinion expressed by the Court of Appeal in the present case on any point of law. But deference in a subsequent proceeding to an expression of opinion by a higher court in a previous proceeding is as far as possible removed from the enforcement of the judgment pronounced in that proceeding. The function of a Court of Appeal is to deal with the judgment before it for review, and not to pronounce opinions on a point of law which may remove a difficulty from the path of a litigant in future proceedings. That the exposition of the law by the Court of Appeal might have the suggested effect of removing a barrier to the further action of the Ecclesiastical Court is a mere incident of the present case, not applicable to the class of cases in general, and it is with the general question whether an appeal lies in such cases that we have to deal. I am driven, then, to the conclusion that, where a person has been discharged by the High Court, under a writ of *habeas corpus*, the Court of Appeal has no power effectually to interfere with the action of the court below. The judgment of the higher court cannot in anywise affect the discharge, or restore to custody the person liberated. It is incompetent to give effect to its judgment, and cannot undo that which it holds to have been wrongly done by the order appealed from. I think it is impossible to read the section your Lordships have to construe without seeing that the power to hear and determine an appeal, and the power to enforce the judgment of the Court of Appeal in case it should differ in opinion from the court below, were intended to be co-extensive. And I cannot think that it was ever contemplated that an appeal should be entertained from any class of orders when that which was effected by them could never be effectually interfered with. The jurisdiction of the courts whose functions were transferred to the High Court, to discharge under a writ of *habeas corpus*, was well known, and if it had been intended that an appeal should lie against such an order, I think that provision would have been made to enable the

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Court of Appeal to restore to custody the person erroneously discharged. In the absence of such a power the appeal is futile, and this appears to me to be a sufficient reason for holding that the Legislature did not intend the right to hear and determine appeals to extend to such cases. It was said that it sometimes happens that events subsequent to the judgment of a court of first instance render it impossible for the Court of Appeal to remove the effect of the judgment below, even though it should hold that judgment to have been a wrong one, and that it could not be contended that on this account the judgment could not be appealed against. This is no doubt true, and many illustrations of it might be given. But the difficulty there arises from the accidental circumstances of the particular case. Here it is inherent in the nature of the order itself in all cases in which a person is discharged from the custody of the law. This distinction appears to me to be a vital one. I ought to notice the decisions of the Privy Council which were strongly pressed upon your Lordships, though I confess I do not think they have any great bearing upon the present case. It was said that the Privy Council had in these cases reversed the judgment of the court below, which had discharged a prisoner under a writ of *habeas corpus*. But it must be observed, in the first place, that the power of the Privy Council to enforce its judgments is conferred in very different terms to those which we have been considering (see 3 & 4 Will. 4, c. 41, s. 21). And next, no question arose there as to the power of the Privy Council to entertain the appeals, and indeed no such question could be raised. Her Majesty in Council may entertain an appeal by any person aggrieved by the action of her colonial courts, and might well determine a question of law, for the purpose of guiding those courts in the future. The relation of the Queen in Council to the colonial courts differs altogether from the statutory relation of the Court of Appeal to the High Court of Justice. It was contended by the learned counsel for the respondent that, inasmuch as the Legislature has, by the Judicature Act, limited the number of courts to which application for a writ of *habeas corpus* might be made, it had by way of compensation, given an appeal against the orders made in all such cases. I do not think that such an explanation of the legislation can be sustained. The remedy of *habeas corpus* would be sought in the majority of cases in a criminal cause or matter, where admittedly no appeal has been given. It will be seen that the reasoning which has led me to the conclusion that an appeal will not lie from an order discharging a person from custody under a writ of *habeas corpus* has no application to an appeal from an order refusing to discharge the applicant. I intend to express no opinion whether there is an appeal in such a case. That question does not arise here, and any opinion expressed upon it would be extra-judicial. I refer to it only because it was suggested that, if there was an appeal in the one case, it was scarcely to be conceived that there

should not be an appeal in the other. I do not think so. There would be, to my mind, nothing surprising if it should turn out that an appeal lay by one whose discharge had been refused; but that there was no appeal against a discharge from custody. It would be in strict analogy to that which has long been the law. The discharge could never be reviewed or interfered with, the refusal to discharge on the other hand, was always open to review; and although this review was not, properly speaking, by way of appeal, its practical effect was precisely the same as if it had been. Another argument was submitted, to which I ought, perhaps, to refer. It was urged that the Court of Appeal could, at all events, deal with the costs in the court below, and that an appeal lay, if only for the purpose of enabling them to do so. But when once the conclusion is reached that, in orders of this description, it was not intended that there should be an appeal on the merits, I think it impossible to hold that it was intended that an appeal should lie merely for the purpose of dealing with costs. There remains the contention that the proceedings in the present case were irregular, that there ought to have been first a rule to bring into court the body of the applicant, and then a rule to discharge him from custody. It was said that, if this course had been pursued, there might well have been an appeal from the first of these rules, as the Court of Appeal would have full power to enforce their judgment, in case they considered that there was no ground for bringing up the body of the applicant. It is unnecessary to determine whether an appeal would lie from an order for a writ of *habeas corpus* if it were brought to the Court of Appeal before there had been a discharge under it. No such point arises here. But the respondent argues that it was not competent for the High Court to discharge the prisoner without having him first brought before them. It was admitted that the procedure adopted was sanctioned by the Crown Office rules of 1886; but it was suggested that the rule which gives sanction to this course was *ultra vires*, inasmuch as the presence in court of the person whose custody was in question was essential to the jurisdiction of the High Court to discharge him. No such point was raised on the argument in the present case in the Queen's Bench Division, and the respondent has failed to satisfy me that the rule was *ultra vires*. I do not think that the authorities cited support the view that what was undoubtedly the practice was essential to the jurisdiction. I think that the judgment appealed from should be reversed.

Lords WATSON and MACNAGHTEN concurred.

Lord MORRIS.—My Lords: I am of opinion that the Court of Appeal rightly decided the preliminary question of jurisdiction raised before them, and that they had jurisdiction to entertain and decide the appeal from the order of the High Court of Justice made upon an application for a writ of *habeas corpus*. The order of the Queen's Bench Division, dated the 20th day of

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May, 1887, orders "that a writ of *habeas corpus* issue directed to the gaoler of Her Majesty's prison at Walton-on-the-Hill in the county of Lancaster, commanding him to have the body of" the appellant "before this court immediately after the receipt of the said writ, then and there to undergo and receive all and singular such matters and things as the said court shall then and there consider of and concerning him," and further ordering that the said appellant "be discharged out of the custody of the said gaoler as to his detention by virtue of a writ *de contumace capiendo*, issued from the Chancery of Lancashire, without being brought up personally before this court." The question turns on the construction of the 19th section of the Supreme Court of Judicature Act, 1873, which runs thus: [reads it.] By the 16th section of that Act the whole of the jurisdiction of the several courts enumerated, amongst which is the Court of Queen's Bench, was transferred to the High Court of Justice. The section collects into the new court all those various jurisdictions. That under sect. 19 an order refusing a writ of *habeas corpus* can be appealed from and can be heard and determined by the Court of Appeal, was not argued against at your Lordships' bar on the part of the appellant, and could scarcely, in my opinion, be so argued after the various decisions on such appeals in the Court of Appeal and in your Lordships' House. Why, then, should not an order granting a writ of *habeas corpus* and discharging the prisoner be also appealed from under sect. 19? The argument that no appeal lies in such a case appears to me fallacious upon two grounds: first, because it goes upon the view that the Court of Appeal has no power under the Act and present rules, and (what is, I think, involved) could not acquire power by rules which could be lawfully made under the Act, to order a person who had been wrongfully released from legal custody on writ of *habeas corpus* to be retaken and replaced in his former custody under the former commitments; secondly, because, even if it had not the power, that would not affect the jurisdiction of the Appeal Court to hear, and the obligation to determine, the appeal, and reverse, so far as it could, the illegal order appealed from. As to the first ground, there is, to my mind, a confusion between the order made on any appeal and the power, authority, and jurisdiction for the enforcement of that order. Sect. 19 undoubtedly gave the Appeal Court power to make orders that could not have been made before, *i.e.*, on appeals from interlocutory orders of the Common Law Division, and for the enforcement of those orders the Appeal Court was to have the powers of enforcement the former courts had in respect, not of such orders (for there could not have been any such), but of the orders they lawfully could make, such powers as attachment, sequestration, &c. If the Appeal Court made an order that the discharged prisoner should attend in court on a specified day, and if he did not he could be attached and brought up under attachment, being then in court, whether attending voluntarily

and then ordered into custody, or brought up in custody under the attachment, the question would be as to the order the court could then make and not the power of enforcing such order. Why could not the Court of Appeal then lawfully re-commit him? No question of enforcement would arise, for, *ex hypothesi*, he was before the court in custody. Thus, the question turns on the nature of the order the Court of Appeal could lawfully make, and not at all on the enforcement of the order made. The importance of this view appears to me to lie in this, that the limitation by reference to the power vested in the High Court applies only to enforcement, which is not in question, and not to the nature of the order, which is the point in question. The nature of the order the Court of Appeal may make is prescribed by Order LVIII., rule 4, which (*inter alia*) says the Court of Appeal "shall have power to make any order which ought to have been made," and which would, in this case, be to re-commit the prisoner. I cannot concur with the argument applying the limitation introduced by reference to the powers of the High Court to the "order" to be made, which in many cases must be essentially new, instead of to the enforcement of it, to which alone the limitation is applied by the second paragraph of the section. But now I will assume that there would not be under the express words of the 19th section power to enforce the order. Does that necessarily limit the appealable matter? In my judgment, No. The real limits of the appealable matter are defined by the first sentence of sect. 19 dealing with jurisdiction to hear and determine; the second sentence is ancillary only to that which is defined by the first sentence, and can neither extend nor restrict it. The exceptions made, such as by sect. 47 of criminal matters, show a clear intention that every order, not expressly excepted in the Act, should be subject to be appealed from. Now, the argument for the appellant engrafts a new exception not mentioned, but said to be implied—and why so? By reason of a sentence intended not to cut down the prior subject matter, but to extend to the entire of it. The first sentence of sect. 19 taken by itself would clearly include the order in this case. The second sentence is ancillary only, and is intended to be co-extensive with the first, and if in the result it was not co-extensive, then, in my opinion, the maxim should come in, *Quando lex aliquid alicui concedit conceditur et id sine quo res ipsa esse non potest*. Whenever anything is authorised to be done by law, and it is impossible to do that thing unless something else not authorised by express terms be also done, then that something else will be supplied by necessary intendment. But, without applying this maxim, there is surely at least power to formally reverse the former order. If the order is within the section and the subject of appeal, it cannot be taken out of it by reasoning based on practice or procedure; and if alteration in the latter (namely, practice or procedure) be wanted the judges have, in my opinion, full power to make rules as to the practice and procedure suitable for all

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habeas corpus cases; and if by the present rules the order reversing the order of the Queen's Bench cannot be effective to put the appellant back in prison again, that goes merely to its effect, not to the jurisdiction to make it. I see no reason why a rule could not be made by the judges under the Judicature Act whereby in such a case as the present the sheriff could be directed to retake the party discharged and render him to prison, there to remain under the original writ *de contumace capiendo*. If so, the absence of such a rule should not affect the jurisdiction to hear the appeal. I confess I am not at all impressed with the arguments derived from "the liberty of the subject" or "constitutional changes." In the first place, no appeals lie from any judgment of the High Court to the Court of Appeal in criminal matters, and it has been decided that what is criminal matter should be taken in its widest sense. Next, Mr. Jeune, in his very able argument, referred to two cases before the Privy Council. In the first, *Reg. v. Mount* (32 L. T. Rep. N. S. 279; L. Rep. 6 P. C. 283) an appeal was entertained from the judgment of the Supreme Court of Victoria holding that the return to the writ of *habeas corpus* was bad, and ordering the discharge of the prisoner and setting him at large. Again, in the *Attorney-General for Hong Kong v. Kwok-a-Sing* (29 L. T. Rep. N. S. 114; L. Rep. 5 P. C. 179), on appeal from two orders of the Supreme Court of Hong Kong, whereby the prisoner was twice released from custody on writs of *habeas corpus* on appeal, while the first order was confirmed, the second was reversed. Of course, I am aware that these appeals were not brought under a statute, but on petition to Her Majesty referred to the Privy Council. But I fail to see why, if it was not unconstitutional to reverse an order of discharge of a prisoner on writ of *habeas corpus* under the advice of the Judicial Committee of the Privy Council, it is unconstitutional to do so by the Court of Appeal or by your Lordships' House, provided the intention of the Legislature as conveyed by the words of the section of the statute cover the case. The intention of the Legislature in this case, as in others, should be governed by *Id voluit quod dixit*; and I cannot attempt to express my opinion better than in adopting the words of Lord Cairns, L.C. on the construction of this same 19th section in the case of the *Overseers of Walsall v. London and North-Western Railway Company* (39 L. T. Rep. N. S. 453; 4 App. Cas. 30), as follows: "I do not think it is open to doubt that these clear and definite words of the Legislature must have their full effect given to them. You have here on the one hand a rule of the Queen's Bench Division, and on the other hand an enactment that every rule of the Queen's Bench Division is to be open to appeal." In the same case Lord O'Hagan says: "We are acting in our judicial, not in our legislative capacity, and we are not free to act on speculation or theory as to what law would be wisest." I say for myself my duty is *jus dicere*, not *jus dare*, when construing a statute. I

consequently concur in the unanimous judgment of the Court of Appeal that they had jurisdiction to hear and to determine the appeal in this case,

Lord FIELD.—My Lords: I am of opinion that the order of the Court of Appeal, so far as it relates to the point of jurisdiction, is correct, and ought to be affirmed. I think that, when the Legislature gave to that court jurisdiction “to hear and determine appeals from any order of the High Court,” it rendered all orders in *habeas* subject to appeal. I arrive at this result by applying to this statute to the best of my ability the well known and settled rules of construction. Admittedly the word “order” used in the 19th section is comprehensive enough in its literal sense to include the order now in question; but it seems to me that the Legislature has not left the matter standing there, it has reduced the generality of the word “order” to specific orders by making careful specific exceptions. All orders not excepted, and therefore orders in *habeas* in civil causes or matters, are thus, in my opinion, included. In order to arrive at the exceptions the framers of the Act must have passed in review the nature and characteristics of all the various orders which it was competent to the High Court to make, and it has divided those in which an appeal should not be given from those which were to be so liable. Now, the admitted rules of construction lay down that I am not at liberty to infer an intention contrary to the literal meaning of the words of a statute, unless the context or the consequences which would come from a literal interpretation justify the inference that the Legislature has not expressed something which it intended to express, or unless such interpretation (in the language of Parke, B. in *Becke v. Smith* (2 M. & W. 191) leads to any manifest “absurdity or repugnance,” with this superadded qualification that the absurdity or repugnance must be such as manifested itself to the mind of the lawmaker, and not such as may appear to be so to me: (Willes, J. in *Motteram v. Eastern Counties Railway Company*, 7 C. B. N. S. 58.) See the authorities collected in Maxwell on the Interpretation of Statutes, c. 9, s. 1. These principles were not indeed denied by the appellant’s counsel at your Lordship’s bar, but they argued that, as well from the consequences which would ensue if such an order were liable to appeal, as from the context of the statute itself, it was apparent that the Legislature had not included or intended to include the “order” now in question in the enacting part of sect. 19. In support of this argument it was correctly stated, as some of the noble Lords who have addressed your Lordships have already pointed out, that at the time of the Act it was the undoubted right of a subject detained in custody to question by *habeas* the lawfulness of his detention before every one of Her Majesty’s courts in succession, without regard to the refusal to discharge by any one or more of them, and that if any one court came to the conclusion that the applicant was entitled to be discharged, no other court had any power of modification or reversal.

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It was argued, therefore, that if the Judicature Act had to be construed as giving a right of appeal to the Crown or prosecutor, that would be so manifest and unreasonable an encroachment upon the rights and liberty of the subject, and so manifestly repugnant, that it could not have been intended. It was not denied that *habeas* in some shape or stage was within the contemplation of the Legislature as coming within some of the provisions of the Act in question. Indeed, as Lord Bramwell has pointed out, the jurisdiction of the High Court to issue writs of *habeas*, and to remand, hold to bail, or discharge, does not exist unless it is conferred by sect. 16. So that *habeas* is clearly within the provision of that section. Moreover it was (in my judgment advisedly) conceded by the appellant's counsel in their arguments before the Lords Justices that, if upon application for *habeas* an order of remand was made, such an order was included in the word "order." Indeed, this has been so decided, for an appeal was held to lie from an order of attachment in *habeas* in a civil matter (*Reg. v. Barnardo*, 61 L. T. Rep. N. S. 547; 23 Q. B. Div. 305), and no appeal to lie from an order of remand in a criminal matter as being within the exceptions in sects. 19 and 47: (*Reg. v. Alice Woodhall*, 59 L. T. Rep. N. S. 841; 20 Q. B. Div. 882.) Now, I quite agree that it does not follow, of necessity, that because an order of remand is liable to appeal an order of discharge is so. The two orders are, as has been relied upon by some of your Lordships, very different in their nature and consequences. But the admitted intention to include one form of order in *habeas* seems to me to render it highly improbable that the eminent lawyers who are thus shown to have had some forms of order in *habeas* in their minds, and were thoroughly acquainted with their several peculiar characteristics, would not, if they had intended to accept an order of discharge, have guarded against the alleged encroachment upon the liberty of the subject by adding that order to the exceptions which they have so carefully specified, some of which do not seem to me to vie in importance with it. I also feel the weight of the argument which has commended itself to some of your Lordships—viz., the giving in such a matter a new right of appeal as against a subject where none in point of form, if not in substance, existed before; and if nothing in the shape of an equivalent had been given the argument would, although not conclusive to me in face of the actual language of the statute, have derived great additional force. But I cannot conceal from myself that the Legislature has still left to the subject a recourse in succession to such a number of the highest tribunals in the land as, in my judgment, effectually prevents any hurtful consequences from any new limitation which they have effected. Whether strictly appeals or not, the subject has still the right of obtaining a practical review of any improper refusal of his application, not only by the Lord Chancellor and by individual judges, but also by a court composed of as many judges as the president may

think it right to convene. The Legislature has also given, in my judgment, an appeal to an applicant unjustly committed or held to bail, a new right of enormous advantage. For these reasons it appears to me that the appellant's argument, in this respect, fails, and that to construe the 19th section as inclusive of the order of the Divisional Court is imputing a reasonable view to the Legislature rather than anything like absurdity or repugnance. If ever there was a statute to which these elements ought not to be imputed without great necessity, or to which the rules justifying the departure from the literal meaning on the ground of absurdity or repugnance should be carefully and sparingly applied, the Judicature Acts seem to me to claim that place. But it was further argued that, even if an order discharge be an order to which the first part of the 19th section would, taken by itself, apply, and that the respondents' contention to that effect was impossible to be resisted, the provisions of the section which follow show that the Legislature intended some further limitation to be put upon the general words of the first part, and that such limitation was to be found in what was alleged to be the case, that the applicant having once been discharged by the Divisional Court from detention under the writ *de contumace capiendo* of the 4th day of May, 1887, there was no process of any court or courts, ecclesiastical or lay, or ecclesiastical and lay, by which the applicant could again be brought up *ad subjiciendum* until he should, in the words of the writ, "have made satisfaction for the contempt" of which he has been adjudged guilty; and that to suppose therefore that the Legislature intended to confer a right of appeal which was said to be absolutely futile was again to suppose an absurdity rendering it necessary to add to or vary the literal words of the statute. But, although this argument is entitled to very great weight, I am unable to yield to it for several reasons. In the first place, the words at the end of sect. 19 relied upon in this view do not appear to me to be restrictive, but rather ancillary to the jurisdiction already created. It is "for the purposes of and incidental to that jurisdiction" that the Appeal Court is to have all the powers, authority, and jurisdiction by the Act vested in the High Court. These words seem to me to be words of complement and not of curtailment. Neither am I satisfied by the appellant's argument that any such grave blot as it supposes does, in fact, under the circumstances in evidence in this case, rest upon the administration of justice in this country, and that no means exist whereby a contumacious subject can be compelled to pay obedience to the authority of the established tribunals of the land. I have listened with care to the arguments upon this point, and I have carefully examined the authorities cited on both sides. In the result I am unable at this moment to say whether the authority of the spiritual court to signify the persistent contempts and disobedience of the appellant is exhausted,

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so that a new *significavit* and a new temporal writ may not issue. One of the noble lords who have preceded me appears to think such a view is possible. Neither can I say whether a new writ *de contumace capiendo* may not issue upon the existing *significavit*, or whether the existing writ not having been returned, an arrest may or may not be made under it, or if that writ is exhausted. whether an *alias* may or may not issue. These questions are of a highly technical character. But this I can say, and it seems to me to answer the objection, that whether the appellants' or the respondents' views are correct, the matter could not have appeared so unmistakably clear to the framers of the Act as to induce me to suppose that upon these grounds they intended what they have not expressed, and have expressed what they did not intend. I do not propose to discuss the authorities here—not from any want of respect, but because any opinion which I may have formed upon the questions raised does not appear to me to bear upon the only question now before your Lordships, which is one of the jurisdiction of the Court of Appeal, and not of what ought to be done upon the appeal. It also appears to me that Order LVIII., r. 4, forms another answer to the appellant's contention upon this head. The Court of Appeal has held (rightly or wrongly, for that point has not yet been argued) that the Divisional Court erred in discharging the appellant from custody, and that the order *nisi* obtained by him should have been discharged instead of being made absolute. It may be true, and probably is, that the Court of Appeal has no process by which it can do what the court below ought in that event to have done, but *restitutio in integrum* is the right of every successful appellant (*Rodgers v. Comptoir d'Escompte*, 24 L. T. Rep. N. S. 111; L. Rep. 3 P. C. 465), and the Appellate Court, by doing part of that which the court below in the case supposed ought to have done—viz., by discharging the order *nisi* wrongfully obtained—will not only free the respondent from an erroneous decision which must stand very much in the way of any future attempt to enforce the obedience of the appellant, but will also settle the construction of the statutes of Elizabeth and Geo. 3. In the case of *Reg. v. Mount* (32 L. T. Rep. N. S. 279; L. Rep. 6 P. C. 283), although the respondents had been discharged from custody, and had presumed to place themselves outside the jurisdiction of the colonial court, the Judicial Committee did not hesitate to reverse the judgment below. The appellant's counsel also raised some minor points in bar of jurisdiction, but they were not sufficiently weighty to induce me to alter my view, which is, that your Lordships have the jurisdiction, and therefore the duty, to determine the appeal.

Order appealed from reversed; order of the Queen's Bench Division restored. The respondent Hakes to pay the costs of this appeal and in the courts below.
Solicitors for the appellant, Brooks, Jenkins, and Co.

Solicitor for the respondent Hakes, Girdlestone, Peterson, and Todd.

Solicitor for the respondent Lord Penzance, *The Solicitor to the Treasury*.

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Habeas corpus
—Judicature
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QUEEN'S BENCH DIVISION.

Nov. 17 and 20, 1890.

(Before STEPHEN and WILLIAMS, JJ.)

REG. v. COLONEL BYRDE AND OTHERS (Justices) AND THE
PONTYPOOL GAS COMPANY. (a)

Justices—Mandamus—Declining jurisdiction—One summons disposed of—Refusal to hear application for second summons—Continuing offence.

*A company were bound under an Act of Parliament to construct a certain reservoir by a certain date, the 26th Nov. 1875, and were liable to a penalty for every week during which it should remain uncompleted after that date. A summons was taken out by the present prosecutor in 1880 to recover penalties under the Act, which summons was dismissed by the justices on the ground that the alleged offence had been completed more than six months before the date of the summons, and that the claim was barred by sect. 11 of 11 & 12 Vict. c. 43. In May, 1890, the reservoir being still uncompleted, an application was made by the prosecutor for another summons for penalties, the prosecutor alleging that the offence was a continuing offence; but the justices refused to hear this application, on the ground that the matter had been already dealt with, and that they had no jurisdiction:—
Held, that, as the justices in refusing to hear the application had in effect declined jurisdiction, a mandamus ought to go directing them to hear and determine whether, under the circumstances, a summons ought now to issue.*

RULE for a mandamus to the Justices of Monmouthshire to hear and determine a case under the following circumstances:
In the year 1873 the Pontypool Gas and Water Company had obtained an Act of Parliament called the Pontypool Gas and

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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Water Act, 1873 (36 & 37 Vict. c. lvii.), sect. 47 of which Act gave the company power to complete a certain reservoir within the district over which the company had control. The section was as follows :

The company shall, within two years and six months after the passing of this Act (the 26th May, 1873), complete, to the satisfaction of the Board of Trade, the existing reservoir on the said stream or brook called Nant-y-Mailor, so that the same shall be capable of holding not less than 4,500,000 gallons; and if the company fail within the period aforesaid so to complete the said reservoir, then the company shall be liable to a penalty of 20*l.* a week for every week after the expiration of the period so limited until the said reservoir is completed as aforesaid.

In the year 1880 the plaintiff issued a summons for penalties under the section, as the reservoir had not been completed, but the justices were of opinion that, as more than six months had elapsed since the date when the penalties first began to accrue, that is the date fixed for the completion of the reservoir (the 26th Nov. 1875), the plaintiff was barred by the six months' limitation in Jervis's Act, as they held that the offence was completed and the period of limitation began to run at the time when, under the section, the reservoir ought to have been completed, that is to say, from the 26th day of November, 1875, and that the plaintiff had only six months from that date wherein to issue his summons; they accordingly dismissed the summons, but they offered to state a case on the question whether the plaintiff's right was so barred by the statute. This offer to state a case was not accepted or acted upon by the plaintiff, but, instead thereof, in 1882, he commenced an action against the company for penalties, and in this action judgment was given in 1882 for the defendants. This judgment was upheld by the Court of Appeal and the House of Lords, on the ground that the action, being for penalties, could not be maintained by a private person.

The plaintiff then applied, in May, 1890, for another summons before the magistrates, claiming a large sum as penalties, but the justices refused to grant the summons or to hear any argument in the matter at all, on the ground that they had already disposed of the whole matter on the former summons, and that they had then offered the plaintiff a case which he had not accepted.

The plaintiff then obtained the present rule for a *mandamus* to the justices to hear and determine his application for a summons.

By an Act of Parliament passed in July, 1890, the section in question, under which these penalties arose, was repealed, but the rule in the present case was moved before that repeal.

Ram, for the justices, showed cause.—The justices were right in refusing to entertain the second summons, as the whole matter was disposed of in the former summons and the justices had no jurisdiction to go into the matter again. The power to recover penalties of this kind is limited to six months by sect. 11 of 11 & 12 Vict. c. 43. When the matter came before the justices on the former occasion in 1880, they held that the offence complained of was not a continuing offence, and that, as it was more than six months since the right to sue for these penalties first

arose, namely, on the 26th day of November, 1875, the plaintiff's right was barred, and they dismissed the summons, but they offered to state a case for the plaintiff. The plaintiff, by refusing to accept that case, has debarred himself from now applying to the justices, for, if the justices were wrong in holding that the offence was a continuing offence, that was the proper time for the plaintiff to raise the question by an appeal. The offence here was not a continuing offence, and the justices were right. Up to 1881 there was a dispute as to whether this reservoir was necessary, but in November of that year the surveyor to the Board of Trade expressed his satisfaction with the reservoir. The construction put upon this section by the justices was the correct one, that the offence was not a continuing offence, that the six months' limitation applied, and that therefore the plaintiff's right was barred.

A. T. Lawrence, for the Pontypool Gas Company,

Ruegg, for the prosecutor, in support of the rule.—This application was made in proper form to the justices, and they refused to entertain the matter altogether, and they refused on one ground, and one ground only, that they had already adjudicated upon the matter. The section which imposes this penalty is the 47th section of the Act, and that section requires the reservoir to be finished to the satisfaction of the Board of Trade, and as a matter of fact the company has never finished this reservoir to the satisfaction of the Board of Trade. The section of Jervis's Act (sect. 11) imposing the limitation only applies when the private Act is silent as to limitation. The Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), as to recovery of penalties, is incorporated with the private Act, and the sections of that Act which apply to the recovery of penalties before justices are sects. 145-151. We have a right to go before the justices, unless we are barred by some statute, and sect. 151 of the Railways Clauses Act is the only one which applies, and that section ends with the words "within six months next after the commission of such offence." The words "next after the commission of such offence" there mean after the end or completion of the offence. But there is here a continuing offence. This section of Jervis's Act was considered in the case of *Mayer v. Harding* (17 L. T. Rep. N. S. 140), where it was held that the non-delivery by a member of a town council of a rate-book in his possession by virtue of his office, was a continuing offence, and that therefore the limitation in sect. 11 of Jervis's Act did not apply. The defence here is, that the prosecutor had not sued within six months after the date of completion; the answer to that is that the offence is a continuing offence. The justices should issue the summons, and they can then decide on the merits as they think fit: (*Reg. v. West Riding Justices*, 6 B. & S. 802.) On the authority of these cases the justices were clearly wrong in holding that there was no continuing offence, and that the six months' limitation applied. The only question now is, whether we are

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entitled to a summons that the justices may go into the matter. This rule ought therefore to be made absolute.

Our. adv. vult.

Nov. 20.—The judgment of the court was read by WILLIAMS, J.—We are of opinion that this rule must be made absolute. The ground upon which the justices refused the summons was that a summons for an offence of the same nature had been taken out by the present prosecutor in 1880, and dismissed on the ground that the offence alleged had been completed more than six months before the date of the summons, and that therefore they had no jurisdiction to go into the matter again. It appears from the affidavit of the clerk to the justices that after the hearing of the complaint in 1880 the justices, at the instance of the prosecutor, consented to state a case for the opinion of the Queen's Bench Division of the High Court, raising the question whether the non-completion of the reservoir by the 26th day of November, 1875, the time limited by the special Act, was an offence which was complete at that date, namely, a date more than six months before the date of the summons, or whether it was an offence continuing in each week that the non-completion continued. It further appeared by his affidavit that the prosecutor failed to take up that case, and thus acquiesced in the validity of the decision of the justices. The question, then, that we now have to decide is, whether that previous decision was a sufficient ground for the refusal of the justices to issue the present summons. Now, generally speaking, if, on application for a summons for an indictable offence, the justices have heard and determined the application, and, on the merits, have declined to grant it, the court will not grant a *mandamus* to compel them to review their decision. *Secus*, if they have refused to hear the application, or if, after hearing, have refused to grant it from a mistaken view of their duty, amounting to a declining of jurisdiction: (*Reg. v. Fawcett*, 19 L. T. Rep. N. S. 396.) The justices, however, must have declined jurisdiction. This court cannot review the discretion of the justices if the justices have really and *bonâ fide* exercised that discretion, although the judgment of the justices may be wrong in law or in fact, as to whether a legal offence has been made out. This seems to be the outcome of the decisions, and in particular of *Reg. v. Adamson* (1 Q. B. Div. 201; same case, *Reg. v. Justices of Tynemouth*, 33 L. T. Rep. N. S. 840, and *Ex parte Lewis*, 59 L. T. Rep. N. S. 338; 21 Q. B. Div. 191). Blackburn, J., in his judgment in the former case, points out that the words in 11 & 12 Vict. c. 42, s. 9, "if they shall think fit," show that the justices have a discretion, and the *mandamus* in that case was granted expressly upon the ground that the justices had not exercised a discretion. The justices may, however, it would seem, in the exercise of their discretion refuse to issue a summons, even though there is evidence before them of an alleged indictable misdemeanour, if they consider that the issue of the summons

would be vexatious or improper (see *Reg. v. Ingham*, 14 Q. B. 396), the only question before the court upon the application for a *mandamus* being, have or have not the justices exercised their discretion honestly in refusing to issue the summons? In the present case, however, it appears from the affidavit of the clerk to the justices that they had not exercised any discretion; they have simply declined jurisdiction. We think further that the justices were wrong in declining jurisdiction, and we think, therefore, that a *mandamus* must go directing them to consider the evidence and decide whether a summons ought or ought not to issue. We do not mean by this decision in any way to conclude the question as to whether a summons ought to issue, but merely to direct the justices, instead of declining jurisdiction, to hear and determine whether, upon the circumstances disclosed to them, a summons ought now to issue. In the case of *Reg. v. The Mayor of Wisbech* (7 Times T. Rep. p. 21) the court refused a *mandamus* to direct justices to issue a summons on the ground, however, that one summons had already been issued and disposed of. Under these circumstances the rule, as I have said, will be made absolute, but without costs.

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Rule absolute.

Solicitor for the prosecutor, *R. Biale*.

Solicitors for the company, *Few and Co.*

Solicitors for the justices, *Harrison and Powell*, for *Edwards* and *Le Brasseur*, Pontypool.

QUEEN'S BENCH DIVISION.

Monday, Oct. 27, 1890.

(Before DAY and LAWRENCE, JJ.)

CONYBEARE v. THE LONDON SCHOOL BOARD. (a)

School Board—Imprisonment of member of board for "crime"—Criminal conspiracy in Ireland—Conviction by court of summary jurisdiction—Vacating office—Elementary Education Act, 1870 (33 & 34 Vict. c. 75), sched. 2, part 1, rule 14—Criminal Law and Procedure (Ireland) Act, 1887 (50 & 51 Vict. c. 20).

(a) Reported by ALFRED H. LEFROY, Esq., Barrister-at-Law.

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Rule 14 of sched. 2, part 1, of the *Elementary Education Act, 1870*, provides that "if a member of the School Board . . . is punished by imprisonment for any crime . . . such person shall cease to be a member of the School Board, and his office shall thereupon be vacant." The plaintiff, who was a member of a school board, was found guilty, in Ireland, by a court of summary jurisdiction holden under the provisions of the *Criminal Law and Procedure (Ireland) Act, 1887*, of having taken part in a criminal conspiracy to interfere with the administration of the law, and suffered imprisonment without hard labour for such offence:—

Held, that the offence for which the plaintiff had been punished was a "crime" within the meaning of the above rule, and that the plaintiff having suffered punishment by imprisonment for such crime thereby ceased to be a member of the board, and his office had become vacant.

THIS was a special case stated, by consent of the parties, pursuant to the Rules of the Supreme Court, 1883, Order XXXIV., r. 1, in an action in which the plaintiff claimed damages for assault and for refusing his vote as a member of the defendant board; and also a *mandamus* to record the plaintiff's vote as a member of the divisions taken on the 10th day of October, 1889, and his name as a member then present, and to receive and treat him as a member, and to receive and record his votes as such member during his tenure of office.

The facts stated in the case were, so far as material, as follows:

On the 26th day of November, 1888, the plaintiff was duly elected a member of the defendant board for the Finsbury division to serve for the period of three years, and he took his seat at the board as such member accordingly.

On the 22nd day of April, 1889, a summons under the hand of a resident magistrate and justice of the peace for the county of Donegal purporting to be issued under the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), and the Criminal Law and Procedure (Ireland) Act, 1887 (50 & 51 Vict. c. 20), was served on the plaintiff, which recited (*inter alia*)

That a complaint had been made to the said justice that the plaintiff between the 10th day of April, 1889, and the 21st day of April, 1889, at certain places in the said summons mentioned, in the petty sessions district of Falcarragh, in the county aforesaid, being a proclaimed district under the provisions of the Criminal Law and Procedure (Ireland) Act, 1887, did, with one G. R. Benson and divers other persons unknown, unlawfully take part in a criminal conspiracy unlawfully to interfere with the administration of the law, to wit, by unlawfully aiding and abetting the frustration and setting at naught of certain writs and warrants for the recovery of the possession of certain lands and houses, messuages, and premises, issued by courts of competent jurisdiction, and the lawful execution of the same respectively, and by unlawfully inciting certain persons therein mentioned and other persons whose names were unknown, unlawfully to frustrate and set at naught the said lawful writs and warrants, and the lawful execution of the same respectively . . . and by unlawfully aiding and abetting, furthering, and promoting, a certain criminal conspiracy known as and called the Plan of Campaign.

And that the plaintiff, on the 16th day of April, 1889, at certain places in the said summons mentioned, in the county aforesaid, being a district proclaimed as aforesaid,

unlawfully did incite certain persons in the said summons mentioned, and certain other persons whose names were unknown, unlawfully within twelve months after the execution of writs of possession of certain lands, houses, messuages, and premises in the said summons mentioned, unlawfully and wrongfully to hold forcible possession of the said lands, houses, messuages, and premises.

The said summons came on for hearing, and was heard at the petty sessions held for the said district of Falcarragh, then being a proclaimed district under the provisions of the said Act, before two resident magistrates and justices of the peace for the county aforesaid, being and sitting as a court of summary jurisdiction under the Criminal Law and Procedure (Ireland) Act, 1887, on the 23rd day of April, 1889, and on nine subsequent days, when the plaintiff appeared to answer the said charge.

After having heard evidence in support of such charge, the court ordered that the plaintiff should be imprisoned in the gaol at Londonderry for the period of three calendar months, without hard labour, on the charge of having taken part in a criminal conspiracy to interfere with the administration of the law.

The plaintiff appealed against the said order to the County Court judge and chairman of quarter sessions for the county of Donegal sitting at a general quarter session of the peace for the division of Lifford in the said county, on the 5th day of July, 1889. The said judge, having heard the appeal, ordered that the order of the said court of summary jurisdiction should be confirmed; that the plaintiff should be imprisoned in the gaol at Londonderry for the period of three calendar months without hard labour; and that the plaintiff should be treated as a misdemeanant of the first division; and he then issued his warrant to lodge the plaintiff in the said gaol as aforesaid. The plaintiff was arrested, and lodged in the said gaol under the said warrant, and there duly suffered and completed the said term of imprisonment, and was discharged from the said gaol on the 4th day of October, 1889.

On the 10th day of October, 1889, an ordinary meeting of the defendant board was duly held, at which the plaintiff attended to take part in the proceedings as a member of the said board.

On the plaintiff rising to speak to a motion then before the board the defendants, by their chairman, ruled that the plaintiff was no longer a member of the board. The plaintiff then claimed to address the board as a member of the board, and the defendants, by their chairman, refused to allow him to speak or to take any part in the proceedings as a member of the board.

Further, on a division being taken on a motion for adjournment of the debate, the plaintiff tendered his vote, and the defendants, by their chairman, refused to receive his vote, and would not record the name of the plaintiff as a member present at the said meeting, or as one of the members voting upon the said last-mentioned question.

The question for the opinion of the court was whether the punishment with imprisonment of the plaintiff under the above circumstances vacated the office of the plaintiff, and whether

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he thereupon ceased to be a member of the board pursuant to the Elementary Education Act, 1870, 2nd schedule, part 1, rule 14.

By rule 14 of schedule 2, part 1 of the Elementary Education Act, 1870 (33 & 34 Vict. c. 75) it is provided that if a member of the School Board is punished by imprisonment for any crime, such person shall cease to be a member of the School Board, and his office shall thereupon be vacant.

Asquith, Q.C. (with him *W. B. Allen*), for the plaintiff.—The Elementary Education Act, 1870, is only applicable to England, and this part of the rule must be confined to cases where a member of a School Board has been punished for a crime for which he could have been made amenable in England. A crime means an indictable offence, and the offence for which the plaintiff suffered imprisonment was punishable on summary conviction: (*Attorney-General v. Radloff*, 10 Ex. 84, at p. 96.)

Jeune, Q.C. (with him *A. J. Ram*) for the defendants.—The intention of the Legislature in framing this rule was to create a high standard with respect to persons serving as members of a school board. The offence for which imprisonment was awarded in this case was an indictable offence at common law in Ireland as well as in England, although, owing to the extraordinary procedure introduced by the Criminal Law and Procedure (Ireland) Act, 1887, the plaintiff was tried for such offence by a court of summary jurisdiction. The offence here was committed in Ireland where the common law of England obtains, and therefore it is unnecessary to consider whether or not imprisonment for an offence committed in a country where the English common law does not prevail would come within the rule. In the case of *Re Woodall* (59 L. T. Rep. N. S. 841; 20 Q. B. Div. 832), the Court of Appeal held that an application for the extradition of a person for an offence committed abroad was a "criminal cause or matter" within the meaning of sect. 47 of the Judicature Act, 1873.

Asquith, Q.C. in reply.—There is no system of law common to the whole of the United Kingdom. An English statute which speaks of a crime must refer to an offence against the law of England. It would seem to be clear that imprisonment for an offence against Scotch law would not come within the rule, for the common law of England does not run in Scotland, and it would appear to be irrational that imprisonment for offences in Ireland should come within this rule and not imprisonment for offences in Scotland.

DAY, J.—This is an action brought by the plaintiff against the London School Board, nominally to recover damages for an assault and for refusing the vote of the plaintiff as a member of the board, but substantially to try the question whether the plaintiff has or has not vacated his seat on the School Board by the imprisonment which he suffered under a conviction by magistrates in Ireland, on a charge of having taken part in a criminal conspiracy unlawfully to interfere with the administra-

tion of the law. I have not to express any opinion as to the merits of this conviction if I held any, which I do not, and it is sufficient for me to determine the legal question, whether after imprisonment consequent upon this conviction the plaintiff's seat has been vacated. If this be so, it has become vacant under the provisions of rule 14, schedule 2, part 1, of the Elementary Education Act, 1870, which provides that, "If a member of the School Board absents himself during six successive months from all meetings of the board, except from temporary illness or other cause, to be approved by the board, or is punished with imprisonment for any crime . . . such person shall cease to be a member of the School Board, and his office shall thereupon be vacant." Now the plaintiff has undoubtedly suffered imprisonment; he has been imprisoned, without hard labour, as a first-class misdemeanant, for the crime of conspiracy, which is a common law offence against the Crown, for which an indictment will lie in Ireland as well as in England. The particular offence of which the plaintiff was found guilty in this case was that of having taken part in a criminal conspiracy to interfere with the administration of the law, which as much in Ireland as in England, is an offence against the Crown at common law, for which an indictment might, except for a particular statute, have been preferred. It is not necessary for us, therefore, to consider the case of an offence committed in a country where the common law of England does not prevail, and where the offence could not be said to have been committed against the Crown. This, moreover, was none the less a crime because the Crown did not proceed by indictment, but took advantage of a statute passed by the Legislature which enabled a court of summary jurisdiction to deal with the offence. The plaintiff, therefore, having suffered imprisonment on such a charge by the order of the tribunal delegated to hear such cases, seems to me to have suffered imprisonment for a "crime" within the meaning of the rule, and by such imprisonment to have vacated his seat upon the School Board. Under these circumstances, the defendants are entitled to judgment.

LAWRANCE, J.—I am of the same opinion, and have nothing to add.

Judgment for the defendants.

Solicitors for the plaintiff, *Hores and Pattison*.

Solicitors for the defendants, *Gedge, Kirby, and Millett*.

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COURT OF APPEAL.

Wednesday, July 2, 1890.

(Before LORD ESHER, M.R., LINDLEY and BOWEN, L.JJ.)

MARKS v. BEYFUS AND OTHERS. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Evidence—Witness—Director of Public Prosecutions—Refusal to disclose source of information—Prosecution of Offences Act, 1879 (42 & 43 Vict. c. 22)—Prosecution of Offences Act, 1884 (47 & 48 Vict. c. 58).

In the case of a public prosecution, neither upon the criminal trial nor upon the trial of any subsequent civil proceedings arising out of it can a witness be asked to disclose the name of the persons who have given information, or the nature of the information given. The only exception to this rule is, that upon the trial of a prisoner the judge may, in his discretion, allow such questions if it appears to him to be necessary or right to do so in order to show the prisoner's innocence.

Prosecutions instituted or undertaken by the Director of Public Prosecutions are public prosecutions within this rule, and the Director of Public Prosecutions, if called as a witness, is entitled to refuse to disclose the names of his informants, and the nature of the information he has received.

Decision of the Queen's Bench Division affirmed.

THIS was an appeal from the decision of the Queen's Bench Division (Lord Coleridge, C.J. and Mathew, J.) refusing a new trial.

The plaintiff brought this action against several defendants to recover damages for maliciously, and without reasonable and probable cause, conspiring to institute and instituting a prosecution for fraud against the plaintiff, upon the trial of which he was acquitted; and alternatively for conspiring to cause the Director of Public Prosecutions to institute such prosecution. At the trial before Huddleston, B. and a special jury, the plaintiff, who conducted his own case, put in an information sworn by the defendant Alfred Beyfus, which had been used upon the application to the magistrate for a summons against the plaintiff, and also the depositions taken before the magistrate upon which the plaintiff had been committed for trial. The plaintiff then called as a witness the Director of Public Prosecutions, who, in answer

(a) Reported by J. HERBERT WILLIAMS, Esq., Barrister-at-Law.

to questions asked by the plaintiff, stated that the prosecution against the plaintiff had been instituted by him, and not by the defendants; that he had a written statement which had been supplied to him, but that he declined, on grounds of public policy, to produce that written statement or to disclose the names of his informants; he stated, however, that he was willing to answer these questions if the learned judge thought that they were questions which he ought to answer. The learned judge refused to order him to answer these questions or to produce the written statement, and, no further evidence being adduced on behalf of the plaintiff, directed the jury to find a verdict for the defendants on the ground that there was no evidence that they had been concerned in the institution of the prosecution.

The plaintiff moved for a new trial, which was refused by the Divisional Court.

The plaintiff appealed.

The Plaintiff in person.—The Director of Public Prosecutions was not justified in refusing to disclose the source of his information on any grounds of public policy. This prosecution was in fact a mere private prosecution, and not a public prosecution, and therefore no question of public policy could arise. The cases relied on by the Director of Public Prosecutions in support of his refusal (*Attorney-General v. Briant*, 15 M. & W. 169; *Rex v. Hardy*, 24 State Trials, 199; *Rex v. Watson*, 32 State Trials, 100) were all cases of a really public character in which questions of public policy would arise, being prosecutions for defrauding the revenue and for high treason. The case of *Reg. v. Richardson*, (3 F. & F. 698), where a police-constable was ordered to disclose the source of his information, is one which is in point in the present case. Before refusing to order the witness to answer these questions and produce the written statement, the learned judge ought to have inquired into the nature of his information, and then have decided whether he ought to answer or not.

Cock, Q.C., *Winch*, Q.C., and *H. Kisch*, for the defendants, were not called upon.

Lord ESHER, M.R.—As to the first cause of action alleged, I think that the plaintiff was bound to prove that the defendants conspired together to institute the prosecution themselves, and did institute it, or that they conspired together to instigate the Director of Public Prosecutions to institute the prosecution, and that he did so. I think that the plaintiff has failed to show that the defendants conspired together to make a false charge with the view of setting in motion either the magistrate or the Director of Public Prosecutions. He says that the defendants gave false evidence, but that charge is based solely upon the fact that they did give evidence; even assuming everything in favour of the plaintiff, it amounts at the most to this, that each of the defendants knew that he was giving false evidence, but that does not prove a conspiracy. It is not enough, however, to show that the defendants did conspire to give false evidence; it must be

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shown that they did, in pursuance of the conspiracy, institute the prosecution, or instigate the Director of Public Prosecutions to do so. Was there, then, any evidence of such institution or instigation? It was pointed out during the argument that if the Director of Public Prosecutions had not been called as a witness by the plaintiff the fact that the defendants, or one of them, had sworn an information against the plaintiff might have been evidence that they instituted or instigated the prosecution; but the effect of such evidence was entirely nullified by the evidence of the Director of Public Prosecutions, who stated that he instituted the prosecution. The Director of Public Prosecutions was then asked by the plaintiff from whom he received the information upon which he acted, but he refused to answer that question, and was upheld in his refusal by the learned judge. We must assume, therefore, that the Director of Public Prosecutions, and not the defendants, instituted the prosecution. Any conspiracy, therefore, by the defendants to institute the prosecution themselves would have been a conspiracy without any result, and not actionable. Then, did the defendants conspire to instigate the Director of Public Prosecutions to institute the prosecution against the plaintiff, and did they in fact procure the institution of the prosecution by him? Unless the Director of Public Prosecutions ought to have answered the questions asked by the plaintiff and would have said that the defendants asked him to institute the prosecution, there would have been no evidence that they procured him to prosecute. The case, therefore, depends wholly upon whether the Director of Public Prosecutions ought to have answered the questions put to him. The ground of refusal relied on by the Director of Public Prosecutions is, that this was a public prosecution, ordered by an official of the Crown, for what was considered to be a public object, and that therefore the information upon which the prosecution was instituted ought not, upon grounds of public policy, to be disclosed. The question whether this was a public prosecution in this sense depends upon the true construction of the statutes by which the office of Director of Public Prosecutions was created, and we have to determine whether a case becomes a public prosecution instituted by the Government for the public protection, whenever that official acts under the rules ordinarily regulating his duties, or under the direction of the Attorney-General. The Director of Public Prosecutions was first appointed under 42 & 43 Vict. c. 22, and his power to institute criminal proceedings is subject to the conditions imposed by sect. 2 of that Act. What is the nature of prosecutions instituted by him, and that they are somewhat different from other prosecutions, appears from the provisions of sect. 7, which provides that "nothing in this Act shall interfere with the right of any person to institute, undertake, or carry on any criminal proceeding," and that where he institutes proceedings he shall not be bound over to prosecute, or required to give security for costs, and that it shall not be necessary to bind over

any person to prosecute, and that any person who has been bound over, or given security for costs, shall be released from such obligation upon the Director undertaking the case. By that section, therefore, a prosecution instituted or undertaken by the Director of Public Prosecutions is separated from and contrasted with an ordinary prosecution, which, although nominally undertaken in the name of the Queen, is, in reality, undertaken by a private person, and the Director is placed in a different position from that of a private prosecutor. The regulations made under sect. 2 of this Act show in what cases the Director is to act when he is not acting directly under the directions of the Secretary of State or of the Attorney-General. He is to undertake a prosecution where the offence is one punishable with death; where it is of a class the prosecution of which has hitherto been undertaken by the Solicitor of the Treasury; and also "where it appears to the Director that the offence or the circumstances of its commission is or are of such a character that a prosecution thereof is required in the public interest, and that owing to the importance or difficulty of the case, or to other circumstances, the action of the Director is necessary to secure the due prosecution of the offender." These regulations appear to me to place the Director of Public Prosecutions in a position different from that of a private prosecutor; he is in the position which a person authorised by the Government would formerly have been; that is to say, a prosecution instituted by him is a public, as distinguished from a private, prosecution. That being so, what is the law as to the disclosure of the names of informers, and of the information given by them, in the case of a public prosecution? In the case of *Attorney-General v. Briant* (*ubi sup.*), Pollock, C.B., referring to the case of *Rex v. Hardy* (*ubi sup.*), says: "On all hands it was agreed that the informer, in the case of a public prosecution, should not be disclosed. All the judges so decided, and the counsel on both sides admitted that such was the law;" and later on in his judgment says: "The rule clearly established and acted on is this, that in a public prosecution a witness cannot be asked such questions as will disclose the informer, if he be a third person. This has been a settled rule for fifty years, and although it may seem hard in a particular case, private mischief must give way to public convenience. This is the ground on which the decision took place in *Hardy's* case and in *Watson's* case; and we think the principle of the rule applies to the case where a witness is asked if he himself is the informer." That is the rule which was laid down upon grounds of public policy, and is applicable to this case if this was a public prosecution. I think that this was a public prosecution, and that the rule therefore applies. I do not say that this is a rule which can never be departed from. I think that, if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informer is necessary or right in order to show the innocence of the prisoner, one public policy being in conflict with

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another public policy, the greater public policy, that an innocent man is not to be convicted when his innocence can be proved, must prevail. Except in such a case, however, this rule founded upon public policy is not a matter of discretion, but is a rule of law, to be applied by the judge at the trial, who should not treat it as a matter within his discretion whether he will order the witness to answer or not. The learned judge at the trial was therefore quite right in declining to order the witness to answer these questions. The result of his decision was, that the plaintiff failed in adducing any evidence in support of his cause of action founded upon the alleged instigation of the Director of Public Prosecutions by the defendants. In my opinion, this rule applies, not only to the criminal trial itself, but also to all subsequent civil proceedings arising out of the criminal trial; otherwise the privilege would be futile. This appeal must be dismissed.

LINDLEY, L.J.—I am of the same opinion. It is quite clear that the plaintiff could not hope to succeed in his action without the evidence of the Director of Public Prosecutions, and I am satisfied, for the reasons given by the Master of the Rolls, that the learned judge at the trial was right.

BOWEN, L.J.—I am of the same opinion. The same rules of law are applicable, in respect to the first cause of action, whether the charge against the defendants is that they conspired to set the magistrate in motion, or to set the Director of Public Prosecutions in motion; the gist of the action is the damage wrongfully done to the plaintiff, and not the conspiracy. If the plaintiff cannot prove that the defendants set either of these parties in motion he cannot succeed in his action, and it was because he failed to prove this that his case broke down. The information sworn by the defendant Beyfus would, indeed, have been *prima facie* evidence against him that he had set the magistrate in motion; but the evidence of the Director of Public Prosecutions displaced that evidence. There was therefore no evidence on behalf of the plaintiff to go to the jury, and he was rightly nonsuited. The question therefore is, whether the Director of Public Prosecutions was justified in objecting to answer the questions put to him, and whether the judge was right in saying that on grounds of public policy he ought not to be asked to disclose the source of his information. That depends upon whether this prosecution was a public prosecution. If it was a public prosecution the Director of Public Prosecutions ought not to have been asked, either upon the criminal trial or upon the trial of any subsequent civil proceedings arising out of it, upon grounds of public policy, to disclose the name of the informer. The only exception to this rule arises upon a criminal trial, when, if it appears to the judge that the non-disclosure might adversely affect the prisoner, he may order such disclosure to be made; otherwise there might be a danger of innocent persons being convicted. What, therefore, is now the position of the Director of Public Prosecutions? When sects. 2 and 7 of the

Act, and the rules and regulations made under the Act, are looked at, it is clear that a prosecution taken up by the Director is no longer a private, but is a public prosecution within the rule laid down in the case of *Attorney-General v. Briant (ubi sup.)*, and I think that the learned judge was right in applying that rule in the present case. I entirely agree that such a matter as this is not one for the exercise of the judge's discretion, but for the application of the law, and that the privilege does not depend upon the witness claiming it when the question is asked; the judge ought to refuse to allow the question as soon as it is asked. I wish to add that my decision is based upon the fact that a prosecution instituted or taken up by the Director of Public Prosecutions is a public prosecution; the question whether the Director of Public Prosecutions is an officer of State, and as such entitled to claim privilege for State acts, does not arise in the present case.

Lord ESHER, M.R.—I desire to say, in order that there may be no possibility of mistake as to my opinion, that, even if the Director of Public Prosecutions had been willing to answer the questions put to him, the learned judge ought not to have allowed him to do so.

Appeal dismissed.

Solicitors for the defendants, *Beyfus* and *Beyfus*.

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QUEEN'S BENCH DIVISION.

Friday, October 31, 1890.

(Before HAWKINS and STEPHEN, JJ.)

THE FARMERS AND CLEVELAND DAIRIES COMPANY LIMITED (apps.)
v. STEVENSON (resp.) (a)

Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 6, 25—Contract to supply milk—Label attached to churn—Written warranty.

By sect. 25 of the Sale of Food and Drugs Act, 1875, "if the defendant in any prosecution under this Act prove to the satisfaction of the justices that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect," he shall be discharged from the prosecution.

(a) Reported by W. H. HOREFALL, Esq., Barrister-at-Law.

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Written

warranty—

Warranty
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contract to
supply milk

—Label with
words of
warranty
attached to
each churn—

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c. 63, ss. 6, 25.

Upon the hearing of an information against the appellants for having sold certain milk to the respondent which was not of the nature, substance, and quality demanded by him, viz., 20 per cent. of its original fat having been abstracted, the appellants proved that they purchased the milk under a contract by which the Higham Company agreed to supply them daily with a certain quantity of "genuine good new milk of the best quality with all its cream on," and by which the vendor warranted each supply of milk to be pure, genuine, and unadulterated, and that attached to the churn which contained the milk of which the milk in question was part, was a label bearing the words "warranted genuine new milk with all its cream on."

Held, that the contract and the label together constituted a written warranty within the meaning of the above section.

THIS was a case stated for the opinion of the Queen's Bench Division of the High Court of Justice by R. J. Biron, Esq., Q.C. one of the magistrates of the police-courts of the metropolis, under the provisions of 20 & 21 Vict. c. 43, and the Summary Jurisdiction Act, 1879 :

1. Upon the 29th day of March, 1890, complaint was made by the respondent, who is an inspector appointed by the vestry of the parish of St. Giles, Camberwell, under the Sale of Food and Drugs Act, 1875, before W. Partridge, Esq., that the appellants, by one William Dickinson, their servant, on the 13th day of March, 1890, unlawfully did sell in its altered state without notice a certain article of food, to wit, milk which was not of the nature, substance, and quality of the article demanded by the purchaser, viz., 20 per cent. of its original fat having been abstracted so as to affect injuriously its quality, substance, or nature. And the said W. Partridge, Esq., having on the 29th day of March, 1890, granted a summons to the appellants to appear before himself or some one of the magistrates of the said police-courts on the 9th day of April, 1890, to answer the matter of the said complaint, the appellants by their solicitor duly appeared before me (the hearing of the complaint having been duly adjourned) on the 23rd day of April, 1890, upon which occasion the respondent was represented by counsel.

2. On Thursday, the 3rd day of April, 1890, the appellants served upon the respondent written notice that they intended as their defence to rely (in addition to any other defences) upon the special defence, namely, that they purchased the milk in respect of which the summons had been granted as the same in nature, substance, and quality as that demanded by the respondent of the said William Dickinson, and with a written warranty to that effect, and that the appellants had no reason to believe, at the time the milk in question was sold to the respondent, that it was otherwise, and that they sold it in the same state in which they purchased it.

3. At the said hearing before me on the 23rd day of April

the following facts were either proved or admitted by and on behalf of the parties to the said proceedings: On the 13th day of March the said William Dickinson, a servant of the appellants, was selling milk which he described as "pure milk, 3d. a quart," and was asked by the respondent for some, and upon being supplied therewith the respondent informed him that he purchased the same for the purpose of analysis by the public analyst. The milk so purchased was then divided into three parts, one of such parts being left with the seller, and one of such parts being submitted by the respondent to the public analyst whose certificate, dated the 25th day of March, 1890, was produced before me, and showed the above deficiency in original fat.

4. On the part of the appellants several witnesses in support of the said special defence were called. They proved, and I find as facts, that on the morning of the said 13th day of March, the Higham Dairy Produce Company consigned a certain large quantity of milk to the appellants from Alfreton in Derbyshire, in certain churns, to each of which churns was attached a label partly written and partly printed in the following terms: "7 cans, 101 imp. galls., March 12th, 1890, of warranted genuine new milk with all its cream on, from Higham Dairy Co. To the Farmers and Cleveland Dairies Co. Limited, St. Pancras." Two of such churns were forwarded by the agent of the appellants from the platform of St. Pancras station, where he had received them, to the Nunhead depot of the appellants, and out of one of them one gallon of milk was given by the manager of the said depot to the said William Dickinson, and from that gallon the respondent purchased the milk, the subject of the said complaint. From the time that the agent of the appellants received the milk upon the railway platform from the train that had conveyed it from Alfreton, the milk had not been interfered with in any way, nor was there any evidence before me that any of the said morning's consignment of milk had been interfered with during any part of its transit from Alfreton to St. Pancras station.

5. There was also produced before me and duly proved an agreement between the appellants and the said Higham Dairy and Produce Company, dated the 21st day of October, 1889, by which the Higham Company agreed to supply to the appellants between the 21st day of October, 1889, and the 25th day of March, 1890, from "100 to 120 gallons daily of genuine good new milk of the best quality with all its cream on." The said agreement contained the following clause: "And the vendor (i.e., the said Higham Company) hereby warrants each and every supply of milk delivered or in course of delivery or to be delivered by him under this contract to be pure and genuine and new milk, unadulterated, and with all its cream on." The milk which was the subject of the said complaint was delivered as stated in paragraph 4 under the terms and in pursuance of the said contract, and I also was of opinion that the appellants at the time of

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the sale of such milk to the respondent had no reason to believe that it was otherwise than of the nature, substance, and quality demanded of the appellants by the respondent.

6. It was contended before me, on behalf of the appellants, that the above-mentioned contract under which the said milk was supplied, together with the said label, amounted to a written warranty of the specific quality of each and every consignment and delivery of milk, and of each and every churn of milk delivered under such contract, and that the said Higham Company warranted to the appellants that the actual milk sold to the respondent was pure, genuine, and new milk, and unadulterated, and with all its cream on, and the appellants supplied such milk to the respondent believing it to be of such quality as described in the said contract, and that the said contract alone amounted to a sufficient warranty of the milk's quality as to entitle the appellants to the benefit of sect. 25 of 38 & 39 Vict. c. 63.

7. I overruled the said contentions, being of opinion that the said label constituted a description only, and not a warranty, and I convicted the said appellants and fined them 40s. and 3l. 15s. 6d. as costs for the offence charged against them in the said summons.

8. The appellants being dissatisfied with my said determination in point of law, duly and in full accordance with the statutes and the Summary Jurisdiction Acts Rules, 1886, regulating such applications, applied to me to state a case upon the said points of law raised before me for the opinion of this honourable court, and I accordingly state this case and submit the following question for the determination of this court:

Whether upon the facts above stated the said label, together with the said contract, amounted to a written warranty so as to give the appellants the benefit of sect. 25 of 38 & 39 Vict. c. 63.

Should this court answer the above question in the affirmative, then the said conviction is to be quashed; otherwise the said conviction is to stand.

The Sale of Food and Drugs Act, 1875, provides:

Sect. 25. If the defendant in any prosecution under this Act prove to the satisfaction of the justices or court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he shall have given due notice to him that he will rely on the above defence.

Mansfield for the appellants.—These proceedings were taken under the Sale of Food and Drugs Act, 1875, which provides by sect. 6, that no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds. To that general provision there is the exception, under sect. 25 of the same Act, that a defendant shall be discharged if he prove that he bought the article in the same state as sold and with a warranty. It is

submitted, in the present case, that the contract between the appellants and the Higham Dairy Produce Company and the label attached to the milk churn together constitute a warranty within the meaning of sect. 25, and that the magistrate was wrong in convicting the appellants. These documents are more than a mere invoice of the goods, which it has been held is not sufficient: (*Rook v. Hopley*, 38 L. T. Rep. N. S. 649; 3 Ex. Div. 209.) It may be that the contract alone would not have been sufficiently specific, but when read with the label which identifies the particular goods, it is submitted that that constitutes a warranty. The very thing is supplied in this case which was wanting in *Harris v. May* (12 Q. B. Div. 97).

No one appeared for the respondent.

The Court held, that the contract and the label attached to the milk churn constituted a sufficient warranty to bring the appellants within the provision of sect. 25 of the Sale of Food and Drugs Act, 1879, and not a description only. The warranty was a running warranty, and the fact that the milk was not all delivered at the same time did not affect the question.

Conviction quashed.

Solicitor for the appellants, *Ricketts*.

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QUEEN'S BENCH DIVISION.

Nov. 7 and 13, 1890.

(Before HAWKINS and STEPHEN, JJ.)

Ex parte THE LEICESTERSHIRE COUNTY COUNCIL AND THE STANDING JOINT COMMITTEE OF THE COUNTY OF LEICESTER; *Re* THE LOCAL GOVERNMENT ACT, 1888.(a).

County council—Justices—Standing joint committee—Police rates—Police districts, powers of altering—Police Act, 1840 (3 & 4 Vict. c. 88), ss. 3, 27, 28—Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 3, 9, 28, 29, 30.

The powers conferred upon the justices in quarter session by sects. 3 and 27 of the Police Act, 1840, of dividing a county, or any part thereof, into police districts, and of, from time to time, altering the extent of such police districts, and the number of

(a) Reported by ALFRED H. LEPROY, Esq., Barrister-at-Law.

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of constables
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constables to be appointed for each, is under the Local Government Act, 1888, vested in the standing joint committee of the quarter sessions and county council.

QUESTION submitted by and on behalf of the Leicestershire County Council and the Standing Joint Committee of the county of Leicester, under sect. 29 of the Local Government Act, 1888.

At the Michaelmas Quarter Sessions, holden in and for the county of Leicester, on the 15th day of October, 1849, it was resolved to divide the county into eight police districts, pursuant to the provisions of 3 & 4 Vict. c. 88. This resolution was duly approved by the Secretary of State, and since that time the county has been divided into police districts, and a general police rate and local police rates have been assessed and levied as provided by the said Act.

At a meeting of the Leicestershire County Council, held on the 23rd day of October, it was resolved,

That in the opinion of this council no distinction ought to be made in the assessment and levying of the rate for police purposes throughout the county, but that the entire expenditure in connection with the police should be defrayed in common by the entire county.

It was contended by the county council that, under and by virtue of the provisions of the Local Government Act, 1888, the powers formerly exercised and exercisable by the justices in quarter session of assessing and levying police rates, of altering the existing police districts, and of assessing and levying one equal police rate throughout the county instead of assessing and levying a general police rate and local police rates as hitherto, were transferred, and exercisable by them, subject only to the approval of the Secretary of State.

The standing joint committee, on the other hand, contended that, under and by virtue of the same provisions, the powers aforesaid were transferred to them, and could be exercised by them alone, subject only to the approval of the Secretary of State.

The question submitted to the decision of the court was, whether the powers of the justices in quarter session hereinbefore mentioned were transferred to and exercisable by the county council, or to and by the standing joint committee.

The Police Act, 1840 (3 & 4 Vict. c. 88), provides as follows :

Sect. 3. That for the purpose of defraying the expenses of the said Act (a) in any county [which, or in any part of which, the said Act shall be put in force], the justices of such county, in general quarter session assembled, shall make a fair and equal police rate, and for that purpose shall assess and tax the whole district for which the constables are appointed rateably and equally according to a certain pound rate of the full and fair annual value of all messuages, lands, tenements, and hereditaments liable to the county rate, or which, if the whole of the said district were to all intents and purposes within their county, would be liable to the county rate therein, including all detached parts of other counties, and also all liberties and franchises (except as

(a) 2 & 3 Vict. c. 93.

hereinafter excepted) which are locally situated in such county, or wholly or partly surrounded by such county, and declared by the said Act to be considered as forming part of such county for the purposes of the said Act; but excluding all detached parts of the said county, all parts of the county contributing to the police rate of any other county, or to the metropolitan police rate and all incorporated boroughs which are, or shall be within the provisions of an Act passed in the 6th year of the reign of His late Majesty, for regulating corporations or of any charter granted in pursuance of the last recited Act, or of any Act made for the amendment thereof, and all those towns and places for which constables or watchmen shall have been appointed under the Act passed in the 4th year of His late Majesty, making provisions for lighting and watching parishes in England or Wales, or under any local Act authorising the appointment of constables or watchmen in any town or place, and authorising rates to be made for defraying the expenses of such constables or watchmen, and shall not be discontinued before the passing of this Act, until they shall be discontinued, or until the chief constable of the county within which for the purposes of this and the said first recited Act, such parish, town, or place is situated, shall have notified as he is hereinafter empowered to do, that he is ready to undertake the charge of such parish, town, or place; provided always that all expenses of putting the said Act in execution before the passing of this Act shall be paid out of the county rate as if this Act had not been made.

Sect. 27. And whereas the number of constables needed may be different in different parts of the said county, Be it enacted that it shall be lawful for the justices of the peace for any county, in general quarter session assembled, if they shall be of opinion that a distinction ought to be made in the number of constables appointed to keep the peace in different parts of the county, to divide the county, or any part thereof, into police districts, consisting of such parishes and places, or parts of parishes and places, as shall appear to them most convenient, and to declare the number of constables which ought to be appointed for each police district, and from time to time to alter the extent of such police district, and the number of constables to be appointed for each; and a report of every such proposed division or alteration, and of the number of constables proposed for each police district, with an estimate of its extent and population, and of any other circumstances upon which the determination of the justices shall have been grounded, shall be sent to one of Her Majesty's principal Secretaries of State, and if approved by the Secretary of State, such division or alteration shall be deemed to be completed.

Sect. 28. That if the Secretary of State shall approve of such division of the county, or of any part thereof, into police districts for the purpose aforesaid, the expense of putting the said Act into execution in such county or part of such county shall be classed under two heads of "general expenditure" and "local expenditure;" and the general expenditure shall be defrayed in common by all districts, and the local expenditure, consisting of the expense of the salaries and clothing of the constables appointed for each district, and such other expenses as the justices, subject to the approval of the Secretary of State, shall direct to be included under this head, shall be defrayed by each police district separately, and the police rates shall be assessed and levied in each police district accordingly: Provided always that, notwithstanding the division of any county or part of a county into police districts, the constables of all such districts shall continue as part of the same force, and be subject to the same authority, and be liable, if required, to perform the same duty in any part of the county or elsewhere as if no such division into police districts had been made.

The Local Government Act, 1888 (51 & 52 Vict. c. 41), enacts:

Sect. 3. There shall be transferred to the council of each county, on and after the appointed day, the administrative business of the justices of the county in quarter sessions assembled—that is to say, all business done by the quarter sessions, or any committee appointed by the quarter sessions, in respect of the several matters following—namely, sub-sect. 1. The making, assessing, and levying of county police, hundred, and all rates, and the application and expenditure thereof, and the making of orders for the payment of sums payable out of any such rate, or out of the county stock or county fund, and the preparation and revision of the basis or standard for the county rate.

Sect. 9, sub-sect. 1. The powers, duties, and liabilities of quarter sessions, and of justices out of sessions with respect to the county police, shall, on and after the appointed day, vest in and attach to the quarter sessions and the county council jointly, and be exercised and discharged through the standing joint committee of the quarter sessions and county council appointed, as hereinafter mentioned.

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Sect. 28, sub-sect. 1. The county council shall, as respects the business by this Act transferred to them from quarter sessions or the justices out of sessions, be subject to the provisions and limitations in this Act specified; but, save as aforesaid, shall have and be subject to all the powers, duties, and liabilities which the quarter sessions, or any committee thereof, or any justice or justices, had or were subject to in respect of the business so transferred. Sub-sect. 2. The county council shall, with the exceptions hereinafter mentioned, have power to delegate, with or without any restrictions or conditions as they may think fit, any powers or duties transferred to them by or in pursuance of this Act, either to any committee of the county council appointed in pursuance of this Act, or to any district council in this Act mentioned; the county council may also, without prejudice to any other power whether to appoint committees or otherwise, delegate to the justices of the county sitting in petty sessions any power or duty transferred by this Act to the county council in respect of the licensing of houses or places for the public performance of stage plays, and in respect of the execution as local authority of the Explosives Act, 1875, or of the Act relating to contagious diseases of animals. Sub-sect. 3. Provided that the county council shall not under this section delegate any power of raising money by rate or loan.

Sect. 29. If any question arises, or is about to arise, as to whether any business, power, duty, or liability is or is not transferred to any county council or joint committee under this Act, that question, without prejudice to any other mode of trying it, may, on the application of a chairman of quarter sessions, or of the county council, committee, or other local authority concerned, be submitted for decision to the High Court of Justice in such summary manner as subject to any rules of court may be directed by the court; and the court, after hearing such parties and taking such evidence (if any) as it thinks just, shall decide the question.

Sect. 30. (1) For the purpose of the police, and the clerk of the peace, and of clerks of the justices and joint officers, and of matters required to be determined jointly by the quarter sessions and the council of a county, there shall be a standing joint committee of the quarter sessions and the county council consisting of such equal number of justices appointed by the quarter sessions, and of members of the county council appointed by that council as may from time to time be arranged between the quarter sessions and the council, and in default of arrangement such number taken equally from the quarter sessions and the council as may be directed by a Secretary of State. (2) The joint committee shall elect a chairman, and in the case of an equality of votes for two or more persons as chairman, one of those persons shall be elected by lot. (3) Any matter arising under this Act with respect to the police, or to the clerk of the peace, or to clerks of the justices, or to officers who serve both the quarter sessions or justices and the county council, or to the provision of accommodation for the quarter sessions of justices out of session, or to the use by them or the police or the said clerks of any buildings, rooms, or premises, or to the application of the Local Stamp Act, 1869, to any sums received by clerks to justices, or with respect to anything incidental to the above-mentioned matters, and any other matter requiring to be determined jointly by the quarter sessions and county council, shall be referred to and determined by the joint committee under this section; and all such expenditure as the said joint committee determine to be required for the purposes of the matters above in this section mentioned, shall be paid out of the county fund, and the council of the county shall provide for such payment accordingly.

Sect. 81, sub-sect. 3. Provided that nothing in this section shall authorise a council to delegate to a committee any power of making a rate, or borrowing any money.

Buszard, Q.C. (with him A. Macmorran) for the county council.—By sect. 3 of the Local Government Act, 1888, all the administrative business of the justices in quarter sessions was transferred to the county council, and by sub-sect. 1 of that section, "the making, assessing, and levying of county police rates, and the application and expenditure thereof," is expressly mentioned as part of such administrative business. The question of dividing a county into police districts, or of altering such districts after it has been so divided, is entirely a rating question, and has nothing to do with the efficiency of the force. The duty of making the rates to maintain the police force is expressly vested by sect. 3, sub-sect. 1, in the county council, and, if this be so, it is submitted that they are the body to say how such force is to be

distributed. The county council are also the representatives of the general body of ratepayers, and for this reason should have the control over the distribution of the police.

R. S. Wright for the Standing Joint Committee.—All the duty of making and assessing rates for the maintenance of the county police was transferred by the Local Government Act, 1888, to the county council, but the powers of dividing a county into police districts, and of making any alteration in such districts, were by sect. 9 of that Act transferred to the standing joint committee. Prior to the passing of that Act the absolute control of the police was vested in the quarter sessions, but since then the duty of paying the police has been cast upon the county council, and all the other powers formerly exercised by the quarter sessions have been transferred to the standing joint committee. The duty of dividing a county into districts for the purpose of sending a greater number of police into one district than another is clearly a question of the control of the police, and was therefore transferred to the standing joint committee. The case of *Ex parte The Somerset County Council* (61 L. T. Rep. N. S. 512; 58 L. J. 513, Q. B.) practically decides the present point. There it was held that the standing joint committee have the exclusive control of buildings and premises for the accommodation of quarter sessions, or justices out of session, or for the use of the police, as well as the power of determining all questions as to maintenance and repair thereof, although the duty of providing such sums as the standing joint committee shall deem necessary for such purposes is vested in the county council.

Buszard, Q.C. in reply.

Nov. 13.—*HAWKINS, J.*—This case raises the important question whether the powers or duties of altering police districts, and of requiring an equal police rate to be levied throughout the county, instead of a general police rate and local police rates in the districts into which the county had hitherto been divided, were transferred by the Local Government Act, 1888, to the county council, or to the standing joint committee. In order to see what construction ought to be placed on the Local Government Act, it is necessary to call attention to the sections of the Police Act, 1840, which are set out in the case. By sect. 3 it is enacted that, for the purpose of defraying the expenses of the 2 & 3 Vict. c. 93 in any county in which it shall be put in force, "the justices of such county in general or quarter sessions assembled shall make a fair and equal police rate, and for that purpose shall assess and tax the whole district for which the constables are appointed rateably and equally, according to a certain pound rate of the full and fair annual value of all messuages, lands, tenements, and hereditaments liable to the county rate." Sect. 27 of the same Act, however, more nearly applies to the present question. After reciting that the number of constables needed may be different in different parts of the same county, it goes on

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to provide that, "it shall be lawful for the justices of the peace for any county in general or quarter sessions assembled, if they shall be of opinion that a distinction ought to be made in the number of constables appointed to keep the peace in different parts of the county, to divide the county or any part thereof into police districts consisting of such parishes and places, or parts of parishes and places, as shall appear to them most convenient, and to declare the number of constables which ought to be appointed for each police district, and from time to time to alter the extent of such police districts, and the number of constables to be appointed for each, and a report of every such proposed division or alteration, and of the number of constables proposed for each police district, with an estimate of its extent and population, and of any other circumstances upon which the determination of the justices shall have been grounded, shall be sent to one of Her Majesty's principal Secretaries of State, and, if approved by the Secretary of State, such division or alteration shall be deemed to be completed." This provision for dividing a county into police districts appears to me to be most reasonable, and I can conceive no body of men better fitted to determine whether a greater or a less number of police may be required in any particular district than the justices of the peace in quarter sessions, because they can bring the light of their knowledge acquired as magistrates as to population and crime to bear upon the question. The object of sect. 28 is to produce equality in the rating. It is obvious that, if you divide a county into districts, the number of police to be located in different districts must depend upon local circumstances—population as well as area; a district of small area, but densely populated—as, for instance, the area in which Leicester stands—would require a larger number of police to preserve order than a larger district with a more sparse population which is chiefly rural or agricultural. If this be so, it stands to reason that it would be very unjust to make the population of the rural district pay for the extra police in the urban district. This is provided for by sect. 28, which enacts, "that if the Secretary of State shall approve of such division of the county, or any part thereof, into police districts for the purpose aforesaid, the expense of putting the said Act into execution in such county shall be classed under two heads of general expenditure and local expenditure, and the general expenditure shall be defrayed in common by all districts, and the local expenditure, consisting of the expense of the salaries and clothing of the constables appointed for each district, and such other expenses as the justices, subject to the approval of the Secretary of State, shall direct to be included under this head, shall be defrayed by each police district separately, and the police rates shall be assessed and levied in each police district accordingly; provided always that, notwithstanding the division of any county or part of a county into police districts, the constables of all such districts shall continue as part of the same force, and be subject to the same authority, and be

liable, if required, to perform the same duty in any part of the county or elsewhere as if no such division into police districts had been made." The latter part of this section is merely intended to make it possible that the police of any particular district should serve in any part of the county whenever required to do so. On the 15th day of October, 1849, it was resolved to divide the county of Leicester into eight police districts pursuant to the provisions of the Police Act, 1840. This resolution was duly approved by the Secretary of State, and since then the county has been divided into police districts, and a general police rate and local police rates have been levied. At the time of the passing of the Local Government Act, therefore, the county was divided into police districts, and this arrangement has continued for forty years, so that it may be fairly assumed, I think, that it has worked well. Now we must look at the Local Government Act, 1888, and more especially at sect. 3, which provides that, "there shall be transferred to the council of each county on and after the appointed day the administrative business of the justices of the county in quarter sessions assembled; that is to say, all business done by the quarter sessions, or any committee appointed by the quarter sessions." That is the ordinary administrative business transacted by the justices in session, comprised under various heads set forth, including by sub-sect. 1, "the making, assessing, and levying of county police rates," and the application and expenditure thereof. There is no allusion in this sub-section to the jurisdiction of the justices with respect to the division of the county into police districts, and I cannot believe that it was intended to transfer to the county council the powers expressly given to the justices under the Police Act, 1840. I cannot help thinking that, if it had been intended by the Legislature to transfer these powers to the county council alone, some distinct mention would have been made of that in the Act. This is not all, however, for in sect. 9, sub-sect. 1, I find the following provision: "The powers, duties, and liabilities of quarter sessions, and of justices out of session with respect to the county police shall on and after the appointed day vest in and attach to the quarter sessions and the county council jointly, and be exercised and discharged through the standing joint committee of the quarter sessions and county council." After careful consideration I have come to the conclusion that the true construction of this sub-section is, that all the powers of the justices in quarter session with respect to the division of the county into police districts were vested by it in the standing joint committee. The payment of the county police is one thing, and the distribution of the county police into districts is another. The administrative duty of making and assessing the rates for the maintenance of the police force, and of directing the application and expenditure of them, is, in my opinion, vested under the Local Government Act, 1888, in the county council, and the control of the division of the county into police districts is vested in the standing joint com-

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mittee. I am therefore of opinion that the contention of the standing joint committee is the correct one, and I think that the question should be answered in their favour.

STEPHEN, J.—I entirely agree from first to last with the judgment of my learned brother, which is, therefore, the judgment of the court.

Solicitors for the county council and the standing joint committee, *Kingsford, Dorman, and Co.*, agents for *W. J. Freer, Leicester.*

QUEEN'S BENCH DIVISION.

Tuesday, October 28, 1890.

(Before HAWKINS and STEPHEN, JJ.)

PAYNE (app.) *v.* THOMAS (resp.). (a)

Licensing Acts—Sale of intoxicating liquor—Marked measure—Sale in mug holding specific quantity—Demand by customer for specific quantity—No Imperial standard equivalent—Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 8.

It is provided by the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 8, that "every person shall sell all intoxicating liquor which is sold by retail, and not in cask or bottle, and is not sold in a quantity less than half-a-pint, in measures marked according to the Imperial standards. Every person who acts in contravention of this section shall be liable to a penalty. . . ."

The appellant, a publican, at the request of a customer, served him with a "blue" of beer; a "blue" being well known in the locality as being a vessel of a particular shape and containing about a third of a quart. The appellant drew the beer direct into the "blue" and not into a measure marked according to the Imperial standard. The appellant was convicted under the above section. On his behalf it was contended that, as the customer had asked for beer in a quantity for which there was no Imperial standard measure, the appellant was not guilty of an offence under sect. 8.

Held, that, as the beer was not sold in a measure marked as required by the statute, the conviction was right.

THIS was a case stated by justices under 20 & 21 Vict. c. 43, and was in the following form:—

An information was preferred by John Thomas, an inspector of

(a) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

weights and measures, against Henry Payne, of Llanelly, licensed victualler, for that he, the said Henry Payne, on the 11th day of October, 1889, at the Golden Lion, in the parish of Llanelly, in the said county of Carmarthen, then being licensed for the sale of intoxicating liquors, in certain premises situate in the said parish of Llanelly, unlawfully did sell certain intoxicating liquor, to wit, beer, which was then sold by retail and not in cask or bottle, and was not then sold in a quantity less than half-a-pint in a certain measure not marked according to the Imperial standards, contrary to the form of the statute in such case made and provided; and after hearing the parties and the evidence adduced by them, two of Her Majesty's justices of the peace acting for the division of Llanelly, in and for the county of Carmarthen, did thereupon convict the said Henry Payne of the said offence, and fined him five shillings including costs. And the said Henry Payne, alleging that he was dissatisfied with the said determination as being erroneous in point of law, did within three days thereafter apply to the said justices to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of the High Court of Justice. Wherefore, in pursuance of the statute in such case made and provided, they stated and signed the following case:

The defendant having appeared upon the summons before the said justices to answer to the said information, it was thereupon proved on the part of the said informant that on the 11th day of October last the said informant visited the house of the defendant, licensed for the sale of intoxicating liquors, to test the measures used by him in his trade; that a person by the name of William Jones came in and asked for a "blue" of beer; that the defendant handed to the said William Jones a vessel or blue containing beer, saying, "That's twopennyworth;" that the man paid twopence for the same; that at the time of sale there were conspicuously displayed in the room in which the sale took place cards on which the following notice was printed, *videlicet*: "Notice, the vessel called blue is not represented either as containing any amount of Imperial measure, or as being a measure of Imperial standard, or secondary Imperial measure of capacity;" that the informant seized the measure or "blue," tried it, and finding it contained more than half-a-pint, to wit one-third of a quart, proceedings were taken against the defendant under sect. 8 of the Intoxicating Liquors Licensing Act, 1872, for selling intoxicating liquor in a larger quantity than half-a-pint in a measure not marked according to the Imperial standards. It was proved to the court that there is no Imperial measure answering to one-third of a quart, and that if such a measure or vessel was taken to the inspector of weights and measures to be stamped he could not stamp it. It was admitted that the blue contained more than half-a-pint, and was supposed to contain one-third of a quart, but at the same time the beer was not sold as one-third of a quart, but under the local denomination of a "blue;" a "blue"

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being well known in the locality as being a vessel of a particular shape, and containing about a third of a quart.

The informant contended that the fact of the defendant knowing he was selling intoxicating liquor in a vessel containing more than half-a-pint, rendered himself liable to the penalty under sect. 8 of the above-mentioned Act, and that all intoxicating liquors sold in quantities exceeding half-a-pint must be sold in measures marked according to the Imperial standards. On the other hand, the defendant contended, that sect. 8 of the Licensing Act, 1872, only applied to sales by measure, and that the section was not intended to inflict a penalty for a sale to a customer who might ask for and be supplied with a quantity of intoxicating liquor, which might be more or less than an Imperial measure, and that he was at liberty to sell any quantity of intoxicating liquor exceeding half-a-pint so long as he did not sell it in a vessel representing it as containing any amount of Imperial measure, and he also relied upon sects. 19 and 22 of the Weights and Measures Act, 1878.

Whereupon the said justices did adjudge and determine that the defendant did sell intoxicating liquor by retail in a quantity exceeding half-a-pint in a measure or vessel not marked according to the Imperial standards, and convicted him accordingly.

If the court shall be of opinion that an offence has been committed, then the conviction shall be confirmed, but if the court shall be of a contrary opinion, then the conviction shall be quashed.

The Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 8, enacts:

Every person shall sell all intoxicating liquor which is sold by retail and not in cask or bottle, and is not sold in a quantity less than half-a-pint, in measures marked according to the Imperial standards.

Every person who acts, or suffers any person under his control or in his employment to act in contravention of this section, shall be liable to a penalty not exceeding, for the first offence ten pounds, and not exceeding for any subsequent offence twenty pounds, and shall also be liable to forfeit the illegal measure in which the liquor was sold.

Orump, Q.C. (with him *William Evans*) for the appellant.—It is submitted that the justices were wrong in convicting the appellant. The first provision with reference to selling in marked measures was contained in 3 Geo. 4, c. 77, s. 20, which enacted that an alehouse keeper should sell ale or beer in measures marked to be of full size according to the standard and in no other vessel. That Act was subsequently repealed, and the publican was free to sell in whatever vessel he liked until the passing of the Licensing Act 1872. Under that Act it is contended that, if a customer asks for a pint or quart or other measure of Imperial standard of beer, he must be served in a marked measure; but if he asks for a quantity for which there is no measure of Imperial standard the publican may serve him in the vessel he asks for. By the Weights and Measures Act 1878 (41 & 42 Vict. c. 49), s. 22, it is provided that nothing in that Act shall prevent the sale or subject a person to a fine under

that Act for the sale of any article in any vessel, where such vessel is not represented as containing any amount of Imperial measure. That section meets this very case. It has been decided that where a customer asked for a pint of beer and the publican went into an inner room and drew the beer into a marked measure and then poured it into a jug which he then brought to the customer, that the sale was not complete until the beer was handed to the customer, and that the publican was rightly convicted for selling a pint of beer in a vessel other than a marked measure: *Ady v. Blake* (56 L. T. Rep. N. S. 711; 19 Q. B. Div. 478). If the customer in that case had asked for a jug of beer, there would have been no offence; so in the present case, as the customer did not ask for a quantity for which there was a measure of Imperial standard, it is submitted that there was no offence.

Tudor Howell, for the respondent, was not called upon.

HAWKINS, J.—It always seems to me, that if the language of a section is clear and intelligible, we ought in construing the meaning of the section to apply the ordinary interpretation which is put upon the words used. Now, nothing can be clearer than the language of sect. 8 of the Licensing Act, 1872, which is as follows: "Every person shall sell all intoxicating liquor which is sold by retail, and not in cask or bottle, and is not sold in a quantity less than half-a-pint, in measures marked according to the Imperial standards." It has been suggested to us that we ought to introduce certain words into the section in order to explain its meaning, but I think such words would make the section absurd. Now the penalty for contravening that section is for the first offence a fine not exceeding ten pounds, and for any subsequent offence a fine not exceeding twenty pounds. The clear meaning of the section is, that a publican may sell an intoxicating liquor of a quantity less than half-a-pint in a measure that is not marked, but that if the quantity is half-a-pint or over it must be sold in a measure marked according to the Imperial standard, the only exceptions being when the liquor is sold in a bottle or cask. The case which has been cited to us seems to me to have no bearing in favour of the argument urged on behalf of the appellant, and to be rather in favour of the contention on the other side. Then it is said that sect. 22 of the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49) has the effect of repealing sect. 8 of the Licensing Act, 1872. Now the section of the Weights and Measures Act, 1878, runs as follows: "Nothing in this Act shall prevent the sale, or subject a person to a fine under this Act for the sale, of an article in any vessel, where such vessel is not represented as containing any amount of Imperial measure, nor subject a person to a fine under this Act for the possession of a vessel where it is shown that such vessel is not used nor intended for use as a measure." This section merely relates to measures and vessels dealt with by the Weights and Measures Act, and does not refer to the Licensing Act, 1872,

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and cannot be made use of to explain that Act. There is nothing to say that a person may not be convicted under sect. 8 of the Licensing Act, 1872. It is clear that there was no intention of repealing sect. 8 of the Licensing Act, 1872, for it is not mentioned in the schedule of repealed Acts at the end of the Weights and Measures Act. This provision of the Licensing Act, 1872, being clearly in force, we are bound to interpret it according to the ordinary rules. I cannot imagine language which could be more aptly used to compel persons selling intoxicating liquors to do so, if the quantity is not less than half-a-pint, in measures marked according to the Imperial standards. I am therefore of opinion that the appellant was properly convicted, and the conviction must be affirmed.

STEPHEN, J.—I am entirely of the same opinion.

Conviction affirmed.

Solicitors for the appellant, *Speechly, Mumford, and Landon*, for *Roderick, Llanelly*.

Solicitor for the respondent, *Randell, Llanelly*.

QUEEN'S BENCH DIVISION.

Oct. 29 and 30, 1890.

(Before HAWKINS and STEPHEN, JJ.)

FOSTER (app.) v. NORTH HENDRE LEAD MINING COMPANY
LIMITED (resps.) (a)

Mines—Working shaft—Raising of ore not commenced—Necessity for guides and means of signalling—Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 23, sub-sect. 10.

The respondents, who had completed a shaft in their mine, and were driving a level or tunnel from the same, but had not commenced to raise up any ore by means of the shaft, had not provided guides, nor the proper means of communicating signals from the bottom of the shaft to the surface.

An information was laid against the respondents under the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 23, sub-sect. 10, which enacts that every working shaft of a certain depth shall be provided with guides and proper means of

(a) Reported by W. H. HORSWALL, Esq., Barrister-at-Law.

signalling. The justices dismissed the information upon the ground that, as no ore was being raised up the shaft, it was not a working shaft within the meaning of the Act.

Held, that the shaft was a working shaft, and that the respondents ought therefore to have been convicted.

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THIS was a case stated by three of Her Majesty's justices of the peace in and for the county of Flint, under the statute 20 & 21 Vict. c. 43, on the application of the appellant who was dissatisfied with their determination, and was in the following form:—

1. On the 15th day of April, 1890, an information in writing was lodged by Clement le Neve Foster, Her Majesty's Inspector appointed under the Metalliferous Mines Regulation Act, 1872, for the district of North Wales, against the respondents as owners and agent of the said mine, except the formal parts thereof, in the terms following: that you being the owners and agent of a certain lead mine situate at the Halkyn in the county of Flint, and known as the North Hendre Lead Mine, did not on the 5th day of April, 1890, and on divers days prior and subsequent thereto cause a certain working shaft of the said mine in which persons are raised, such shaft exceeding fifty yards in depth and not exempted in writing by the inspector of the district, to be provided with guides, and some proper means of communicating signals, in contravention of the general rules, sect. 23, sub-sect. 10, of the Metalliferous Mines Regulation Act, 1872.

2. At the hearing of such information Mr. J. P. Cartwright, of Chester, appeared as solicitor for the informant, and Mr. W. H. Churton as solicitor for the defendants; and after hearing the evidence given on behalf of the informant, and the arguments on both sides, and after reading the various sections of the Act of Parliament hereinafter referred to, the said justices dismissed the information, being of opinion that the said shaft was not a working shaft within the meaning of the Metalliferous Mines Regulation Act, 1872.

3. The only evidence given on behalf of the informant was that of the informant himself, who stated that he was an inspector of mines. On the 5th day of April inst. he visited the mine of the defendant company, and went down the shaft, which is ninety-seven yards deep. At eighty-seven yards there was a driving extending about ten yards; there was a bowk or large bucket without "guides;" the bowk was attached to the winding rope; there was an engine to work the rope; there was no covering to the bowk; he went down the shaft in the bowk, and it was the only means for persons going down the shaft; it was dangerous and contrary to the statute to use the bowk without guides; he went down with Captain Ellis, the agent of the mine, and told him it was illegal. In cross-examination he said that the bowk was not used for raising ore; that he called

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the shaft a working shaft because work was being done in it; the word "mine" was defined in the Act; he thought that the shaft in question was a working shaft; Ellis told him that they had only, on the 31st day of March, finished the shaft; a man had been killed at this mine, and that drew his attention to the mine; it was safer that there should be guides, even when the sinking was being prosecuted; it was not usual to do so, but he thought it should be done; he had advised the New Mineral Company to use guides, and they had done so. In answer to the bench he replied that the company should give him notice of sinking the shaft if they were employing more than twelve persons underground; there were twenty-four men so employed; there would be six men down at one shift; there were four shifts; twenty-four men being employed in the twenty-four hours; they might have been driving three weeks; the company was a limited company, and Ellis was the manager.

4. On the part of the appellant attention was called to sect. 23, sub-sect. 10, of the Metalliferous Mines Regulation Act, 1872, and also to sect. 41, and it was contended on his behalf that the respondents had, under the circumstances stated in the evidence, brought themselves within the sections referred to, and the justices were asked to convict them accordingly.

5. On the part of the respondents it was contended that, under the circumstances stated in the evidence, the shaft complained of, and in which the said bowk or bucket was employed, was not a working shaft within the meaning of sect. 23, sub-sect. 10 of the said Act, but was a shaft in the course of construction, and that the offences charged only applied to a shaft that was completed and was being worked for the ordinary purposes of a mine in operation.

6. For the reasons before stated the justices gave their determination against the appellant.

7. The question of law upon which this case was stated for the opinion of the court is, whether a shaft the sinking of which is completed, and from which a level or tunnel is in the course of being driven under the circumstances herein appearing, but which was not being used for raising ore, is a "working shaft" within the meaning of the sections and sub-sections of the Metalliferous Mines Regulation Act, 1872, hereinbefore referred to.

The Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 23, sub-sect. 10, enacts:

Every working shaft in which persons are raised shall, if exceeding fifty yards in depth, and not exempted in writing by the inspector of the district, be provided with guides and some proper means of communicating distinct and definite signals from the bottom of the shaft and from every entrance for the time being in work between the surface and the bottom of the shaft to the surface, and from the surface to the bottom of the shaft, and to every entrance for the time being in work between the surface and the bottom of the shaft.

R. S. Wright for the appellant.—The justices were wrong in putting the narrow construction they did upon the expression

“working shaft.” A working shaft means any shaft in which men work in contradistinction to a pumping shaft, which is used solely for pumping water out of the mine and in which persons are not raised from the mine to the surface. [HAWKINS, J.—Do you say that a shaft in the course of construction is a working shaft?] Yes. If there is any difficulty in fixing the guides because the shaft is not completed, the mine-owner can obtain an exemption in writing from the inspector of the district.

Bankes for the respondents.—It is submitted that the justices were right. “Working shaft” means a shaft by which a mine is being worked, and up which ore is being raised. In the present case no ore was being raised, and it would be almost impossible to have had guides in this shaft before it was completed. This section was not intended to apply to shafts until ore was being raised.

There was a second case in which an information had been filed against the same respondents for not providing cover overhead, and it was agreed that the decision in the present case should govern the second case.

HAWKINS, J.—I am of opinion that we must decide this appeal in favour of the appellant. The object of the Legislature in passing this Act was no doubt to protect workmen during the operations of mining. We have to decide what meaning is to be placed upon the expression “working shaft,” used in sect. 23, sub-sect. 10, of the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77). Now that sub-section is as follows: “Every working shaft in which persons are raised shall, if exceeding fifty yards in depth, and not exempted in writing by the inspector of the district, be provided with guides, &c.” On behalf of the respondents it has been argued that this provision only applies to a shaft up which ore is being brought, and that “working shaft” means a shaft worked for the purposes of the mine. But, if we look again at the object for which this Act was passed, viz., to protect men who are sent down to the bowels of the earth to earn their livelihood, I think we cannot put that narrow construction upon it. In the present case the shaft was actually completed, and men were required to descend by it in order to work the mine. The effect of construing the section in the manner suggested by the respondents would be that men who were working a drift at the bottom of a shaft would not be protected in the manner prescribed by the Act until they had succeeded in obtaining ore. If it had been intended that there should be no protection until the mine was productive, it would have been very easy to have said so. I cannot arrive at the conclusion suggested by the respondents, and the appeal must therefore be allowed.

STEPHEN, J.—I am of the same opinion. The whole object of the Act is for the definite purpose of protecting men working in mines. If the construction suggested on behalf of the respondents were placed upon this sub-section, a large number of men

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would be without the protection which it was intended that they should receive. The argument on behalf of the respondents is very ingenious; but we are asked to put a very technical construction upon very plain words in order to support it. I do not agree with the argument, and the appeal must be allowed.

Appeal allowed.

Solicitor for the appellant, *The Solicitor to the Treasury*, for *Cartwright*, Chester.

Solicitor to the respondent, *Churton*, Chester.

QUEEN'S BENCH DIVISION.

Thursday, October, 30, 1890.

(Before HAWKINS and STEPHEN, JJ.)

MALLINSON (app.) v. CARR (resp.) (a)

Unsound meat—Exposure for sale—Seizure before exposure—Meat prepared for sale—Liability of person in whose possession same found—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 116, 117.

The respondent, a butcher, purchased a cow, which he knew to be unfit for the food of man. He slaughtered the beast, and was about to dress it for human food, when it was seized by an inspector of nuisances and condemned by a justice as unfit for the food of man.

An information was laid against the respondent for having the unsound meat in his possession for the purpose of preparation for sale and intended for the food of man. The justices dismissed the information on the ground that the respondent had not actually exposed the meat for sale.

Held, that the justices were wrong, as a person who has unsound meat in his possession with the intention of selling the same for the food of man is guilty of an offence under sect. 117 of the the Public Health Act, 1875, although he may not have actually exposed the meat for sale.

Vinter v. Hind (48 L. T. Rep. N. S. 359; 10 Q. B. Div. 63) distinguished.

THIS was a case stated for the opinion of the court by justices under 20 & 21 Vict. c. 43, and was as follows:—

An information under sects. 116 and 117 of the Public Health

(a) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

Act, 1875, was preferred by Thomas Mallinson, of Selby, in the West Riding of the county of York, inspector of nuisances, against George Carr, of the same place, butcher, "for that the said George Carr, on the 7th day of May, 1890, at Selby, in the parish of Selby, in the said riding, had in his possession certain meat, to wit, four pieces of beef, for the purpose of preparation for sale, and intended for the food of man, contrary to the statute in such case made and provided," and after hearing the parties and the evidence adduced by them, two of Her Majesty's justices of the peace in and for the said West Riding, and being the majority of the justices then in petty sessions assembled, did thereupon dismiss the said information.

And the said Thomas Mallinson, alleging that he is dissatisfied with the said determination as being erroneous in point of law, did within three days thereafter apply to the said justices, to state and sign a case setting forth the facts and grounds of such determination for the opinion thereon of Her Majesty's High Court of Justice, Queen's Bench Division. Wherefore, in pursuance of the statute in such case made and provided, they stated and signed the following case:—

The defendant having appeared on summons before the said justices to answer the said information, it was thereupon proved, on the part of the said prosecutor, that on the 6th day of May, 1890, the defendant, along with other persons, purchased from one Thomas Kettlewell, of Osgodby, near Selby, miller, a cow for thirty shillings, which a veterinary surgeon had ordered the said Thomas Kettlewell to get killed and dressed, and at the time of sale it was stipulated by Kettlewell that it was not to be offered for human food. The beast was slaughtered and cut up into four quarters the same day, and removed in a cart by the defendant from Kettlewell's premises. On the following day (Wednesday), from information that had come to Kettlewell's knowledge, he went to Selby and saw the defendant and demanded the carcase back again, stating that he had heard it was going to be offered for human food. The defendant then asked Kettlewell if he had given the beast any physic, and on Kettlewell stating that he had not, Carr replied, "Then it is good beef," and that he was going "to pickle it and cut it up," and refused to give back the carcase.

The prosecutor was then informed of the matter, and he went and saw the defendant and told him he wanted to look at a carcase of beef he had. The defendant Carr then unlocked the door of an outhouse, occupied by one Ambrose Chambers, situate in Grey Horse Inn-street, Selby, and he there saw in a cart four quarters of beef. He asked the defendant what he was going to do with it, and he said "put it in pickle and cut it up."

The prosecutor, thinking the meat was not good for human food, took possession of it, and then called in the medical officer of health, Dr. Wilson, and it was taken before a justice of the peace and condemned as unsound and unfit for the food of man.

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Dr. Wilson, the medical officer, was called and proved that he had examined the four pieces of beef, and that it was unsound and unfit for the food of man.

Mr. J. H. Bentof, solicitor, appeared on behalf of the prosecutor, and Mr. Burton, solicitor, on behalf of the defendant, and it was stated and admitted by the solicitor to the prosecutor that there was no exposure of the meat for sale; whereupon on the close of the prosecutor's case the defendant's solicitor contended that, as there was no exposure of the meat for sale, the defendant could not be convicted of the offence charged, and quoted in support of such contention the case of *Vinter v. Hind* (48 L. T. Rep. N. S. 359; 10 Q. B. Div. 63), whereupon the said justices did adjudge and determine that, there being no evidence of exposure of the meat for sale, the case was governed by the ruling in *Vinter v. Hind*, and dismissed the information.

The question upon which the opinion of the said court is desired is, whether the said justices upon the above statement of facts came to a correct decision in point of law, and if the court be of opinion that the said decision was right, then that the same be confirmed; and if otherwise, the court is humbly solicited, according to the powers vested in the court by the statute 20 & 21 Vict. c. 43, to remit the case to the said justices with the opinion of the court thereon, and to make such order as the court may deem fit.

The Public Health Act, 1875 (38 & 39 Vict. c. 55) enacts:

116. Any medical officer of health or inspector of nuisances may at all reasonable times inspect and examine any animal, carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour, or milk, exposed for sale or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man, the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the party charged; and if any such animal, carcase, meat, &c., appears to such medical officer or inspector to be diseased or unsound, or unwholesome or unfit for the food of man, he may seize and carry away the same himself, or by an assistant, in order to have the same dealt with by a justice.

117. If it appears to the justices that any animal, carcase, meat, &c., so seized is diseased or unsound, or unwholesome or unfit for the food of man, he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found shall be liable to a penalty, &c.

Lumley Smith, Q.C. for the appellant.—The justices seem to have misapprehended the decision in *Vinter v. Hind* (48 L. T. Rep. N. S. 359; 10 Q. B. Div. 63). By sect. 116 there is power to seize unsound meat that is exposed for sale, and also that which is deposited in any place for the purpose of sale, or of preparation for sale, and intended for human food. Then by sect. 117 the justices have jurisdiction given them to order the meat to be destroyed, and to inflict a penalty not only upon the person who exposes the meat for sale, but also upon the person in whose possession or on whose premises the same is found. In *Vinter v. Hind* (*ubi sup.*) the unsound meat was given up by a private person who had purchased it for his own consumption, and it was held that,

as the meat had not been seized at the butcher's shop, the butcher could not be convicted of exposing the meat for sale. In the present case the meat was seized while it was in the possession of the respondent, and he admits that he was going to prepare it to sell as food for man. It is not necessary, when a person is charged with having unsound meat in his possession with the intention of selling it as human food, to prove that he has as a fact exposed it for sale.

Scott Fox for the respondent.—It is submitted that the justices were right. Sects. 116 and 117 must be read together, and it seems to be a necessary ingredient to an offence under those sections that the meat has been exposed for sale. The sections deal with two classes of meat, that which is actually exposed for sale, and that which is being prepared for sale, within neither of which classes does the meat in the present case come. The construction which the justices put upon *Vinter v. Hind* (*ubi sup.*) was correct, and it is necessary that there should have been exposure for sale before the offence is committed.

HAWKINS, J.—I am of opinion that the justices, upon the state of facts before them in this case, did not come to a right conclusion, and the case must be remitted to them with that intimation from this court. The information was laid under sects. 116 and 117 of the Public Health Act, 1875, against George Carr, a butcher of Selby, for that he on the 7th day of May, 1890, had in his possession certain meat, to wit, four pieces of beef, for the purpose of preparation for sale and intended for the food of man. Now it appears from the case that, on the 6th day of May, Carr along with other persons purchased from one Thomas Kettlewell a cow for thirty shillings which a veterinary surgeon had ordered to get killed and dressed, and at the time of sale it was stipulated that it was not to be offered for human food. The beast was slaughtered, cut up and taken away by Carr. On the following day Kettlewell asks for the carcass to be given back to him, as he hears it is going to be offered for human food. Carr asked Kettlewell if he had given the animal any physic, and on Kettlewell stating that he had not, Carr replied that it was good beef, and that he should pickle it and cut it up. So that it is quite clear that Carr purchased the carcass upon the express condition that it should not be sold for human food, and there is abundance of evidence that he knew that the beast was unfit for human food, for Kettlewell had told him it was not to be so used, and when he sent for it back, Carr refused to give it up, and said he should pickle it and cut it up. Now sect. 116 of the Public Health Act, 1875, provides, that a medical officer of health or inspector of nuisances may inspect and examine meat exposed for sale or deposited in any place for the purpose of sale, or of preparation for sale and intended for the food of man, and if such meat appears to be diseased, or unsound, or unwholesome, or unfit for the food of man, it may be seized and carried away in order to have the same dealt with by a justice. The meat in the present

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case was found in the possession of the respondent, and was seized and carried away. Then sect. 117 provides: "If it appears to the justice that any animal, carcase, meat, &c., so seized, is diseased, or unsound, or unwholesome, or unfit for the food of man, he shall condemn the same and order it to be destroyed, or so disposed of as to prevent it from being exposed for sale or used for the food of man." That disposes of the diseased meat itself, and then the section proceeds: "and the person to whom the same belongs or did belong at the time of the exposure for sale or in whose possession or on whose premises the same was found, shall be liable to a penalty." The Legislature could not, in my opinion, have used clearer language to give justices power to deal with persons in whose possession diseased meat is found. I cannot read the words in the second part of sect. 117 which I have quoted as being otherwise than applicable to a person who has diseased meat in his possession in the course of preparation for the food of man. This section nowhere says that a man in whose possession diseased meat is found, and who is preparing the same for food, shall not be guilty of an offence under the section unless he actually exposes the diseased meat for sale. It can never have been intended to have construed these words in such a manner. The question asked by the justices, is whether they were right in dismissing the information because there was no evidence of the exposure of the meat for sale. I think exposure for sale is not a necessary ingredient to the offence and the case must be remitted to the justices.

STEPHEN, J.—I am of the same opinion. I think that the judgment in *Vinter v. Hind* (48 L. T. Rep. N. S. 359; 10 Q. B. Div. 63) has been quite misunderstood by the justices, and besides that case is essentially different to the present one and turns upon a different part of the section. I was a party to that judgment, and we are reported to have held that it was essential to complete the offence that there should be an exposure for sale. I think we were clearly right in saying so in that case. The charge in that case was for exposing for sale unsound meat. But those words do not occur in that part of the section which deals with the present case. The offence here is being in possession of meat that is diseased, or unsound, or unwholesome, or unfit for the food of man, and which is intended for the food of man. That offence the respondent undoubtedly committed. It is not necessary to have the exposure for sale or the preparation for sale in order to complete the offence. Therefore the argument that, if there has been no exposure for sale, no offence has been committed fails, and the case must be remitted to the justices with that expression of our opinion.

Case remitted.

Solicitors for the appellant, *Williamson, Hill, and Co.*, for *Bantoft, Selby*.

Solicitors for the respondent, *Ridsdale and Son*, for *Burton, Selby*.

QUEEN'S BENCH DIVISION.

Nov. 10 and 11, 1890.

(Before DENMAN, HAWKINS, and STEPHEN, JJ.)

Re CASTIONI. (a)

Extradition — Habeas corpus — Homicide — Political offence — Reviewal of magistrate's decision—33 & 34 Vict. c. 52, and 36 & 37 Vict. c. 60 (Extradition Acts, 1870 and 1873).

By the Extradition Act, 1870, and by the Extradition Treaty of 1880, between Great Britain and Switzerland, the crimes of murder and manslaughter are, with others, made the subject of extradition, and art. 11 of the treaty incorporates sect. 3 of the Extradition Act, 1870, which excepts from extradition offences of a political character.

Angelo Castioni, a fugitive criminal in England, had been committed to prison under the Extradition Acts, 1870 and 1873, by one of the police magistrates at Bow-street, with a view to his extradition to Switzerland in consequence of a requisition by the Swiss Government for his surrender to take his trial in that country on a charge of murder. An application was made for a writ of habeas corpus for the release of the prisoner, on the ground that the offence charged was a political offence within the meaning of sect. 3 of the Extradition Act, 1870.

Held (adopting the definition of "an offence of a political character" suggested by Stephen, J. in his History of the Criminal Law of England, vol. 2, p. 71), that the homicide for which the prisoner's extradition was demanded was committed not only in the course of, but as incidental to and part of a political insurrection; that it was therefore an offence of a political character within the meaning of sect. 3 of the Extradition Act, 1870; and that the prisoner must be discharged.

Held also, that the court was not bound by the decision of the magistrate on the facts before him, but had power to consider the whole matter, and to receive fresh evidence.

MOTION for rule *nisi* calling upon the Solicitor to the Treasury, F. Lushington, Esq. (the committing magistrate), and the Consul-General of Switzerland, as representative of the Swiss Republic, to show cause why a writ of *habeas corpus* should not issue to bring up the body of one Angelo Castioni in order that he might be discharged from custody.

(a) Reported by MERVYN LL. PERK, Esq., Barrister-at-Law.

Re CASTIONI.

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Habeas corpus
—Political
offence—*

*Reviewal of
magistrate's
decision—*

*Extradition
Acts, 1870*

*and 1873—
33 & 34 Vict.
c. 52; 36 & 37
Vict. c. 60.*

The said Angelo Castioni was arrested at his house in Chelsea on the 3rd day of October, 1890, upon a warrant issued under the Extradition Acts, on a charge of murdering Councillor of State Luigi Rossi, by shooting him with a revolver at Ballinzona, in the Canton of Ticino, in Switzerland, on the 11th day of September, 1890.

The prisoner was brought before F. Lushington, Esq., one of the metropolitan police magistrates at Bow-street police-court, who, after taking evidence both for and against the prisoner, held that the offence was not one of a political character so as to exempt him from extradition under sect. 3 of the Extradition Act, 1870, and committed him to Her Majesty's prison at Holloway to await his surrender to the Swiss authorities.

The evidence contained in depositions sent from Switzerland, those taken at the Bow-street police-court, and in affidavits used on the motion, showed that the prisoner was a native of Stabio, and a subject of the Canton of Ticino, in Switzerland, but for the last seventeen years had resided in London, where he was employed as a marble worker by the late Sir Edgar Boehm, R.A.

On the 3rd day of August, 1890, he left England for Carrara to obtain a block of marble for his employer, and on his way spent some days in Switzerland. Having completed his mission to Carrara, he arrived in the town of Bellinzona on the evening of the 10th, and was in the said town on the 11th day of September following.

Ticino is one of the Swiss cantons confederated under a Central Federal Council, and has a local Government and constitution of its own, one of the provisions of which requires the Government, on the receipt of a petition for a revision of the constitution signed by not less than 7000 voters, to take within a month from the receipt of the petition the vote of the whole body of electors as to whether there shall be a revision of the constitution or not. In Ticino the Ultramontane or Conservative Government had been in power for fifteen years, and in the autumn of 1890 complaints of gross corruption and maladministration were made against them by the opposing or Liberal party.

On the 9th day of August a petition, signed by 9983 voters, demanding a revision of the constitution of the canton, was presented to the Government, but no steps were taken to put the matter to the popular vote, and the Government organs in the press declared that the petition would not be complied with. In consequence of this, and of the discontent that prevailed, an insurrection, headed by one Bruni, a leading advocate in the Canton, broke out at Bellinzona on the 11th day of September. The people, having attacked and disarmed the gendarmerie at the arsenal, obtained a fresh supply of arms, and, having seized and bound five persons—members of or connected with the Government—marched, with these five persons in the front rank to the

Government House, within the gates of which were Councillors Rossi and Gianella with about eighty gendarmes. Admittance having been demanded by the insurgents and refused by the Councillors, the locked gates were broken down, and, as the people rushed into the building, a few shots were fired on both sides, one of which killed Councillor Rossi, a young man who had only lately joined the Government. Immediately afterwards Councillor Gianella came forward, waving a white handkerchief, and said that the Government yielded to superior force. A provisional Government was then formed by the insurgents, and the result of the affair was that, upon interference by a special commissioner, sent by the Federal Council with troops, the unpopular members of the former Government were not reinstated, and, in accordance with the petition, a plébiscite was taken which affirmed the need for a revision of the constitution.

There was evidence tending to show that the prisoner Castioni was present on the day of the insurrection, taking an active part with the insurgents, and that he fired the shot which killed Councillor Rossi, drawing, aiming, and firing a revolver when the latter was only a few paces from him, and that after firing the shot he turned round as if to go, at the same time using an Italian expression signifying "He is down!" or "Someone is down!" Rossi was the only man killed. There was no evidence to show that the prisoner knew him, or had ever seen him before the attack on the Government House. In cross-examination it was admitted by Bruni, the leader of the revolt, that Rossi's death was a misfortune, and not necessary for the success of the movement.

A message or report from the Federal Council to the Federal Assembly of Switzerland concerning the armed Federal intervention in Ticino, and the political situation in the canton was accepted by the court as showing that the movement was regarded by the Swiss Federal Council as a serious political rising, but not as evidence of what took place during the revolt.

By sched. 1 of the Extradition Act, 1870 (33 & 34 Vict. c. 52), murder and manslaughter are included in the list of extradition crimes there given, and by sects. 3 (1) and (4), 9, 10, and 11, it is provided (*inter alia*):

Sect. 3 (1). A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate, or the court before whom he is brought on *habeas corpus*, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.

(4.) A fugitive criminal shall not be surrendered until the expiration of fifteen days from the date of his being committed to prison to await his surrender.

Sect. 9. When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England. The police magistrate shall receive any evidence which may be tendered to show that the crime of which the prisoner is accused or alleged to have been convicted is an offence of a political character, or is not an extradition crime

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Sect. 10. In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

Sect. 11. If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*.

By the Extradition Treaty between Her Majesty and the Swiss Federal Council, signed at Berne, the 26th day of November, 1880, it is provided, in arts. 2, 9, and 11, as follows :

Art. 2 includes murder and manslaughter in the list of crimes for which extradition is to be granted.

Art. 9. In cases where it may be necessary, the Swiss Government shall be represented at the English courts by the law officers of the Crown, and the English Government in the Swiss courts by the competent Swiss authorities.

Art. 11. A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove that the requisition for his surrender has in fact been made with a view to try and punish him for an offence of a political character.

Stephen, J., in his "History of the Criminal Law of England," vol. 2, p. 71, with reference to the expression "offence of a political character," after giving his reasons for coming to such a conclusion, proceeds :

I think, therefore, that the expression in the Extradition Act ought (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances.

Counsel appeared to show cause upon the motion for a rule *nisi*, which was therefore argued and treated as a motion for a rule absolute.

Sir Charles Russell, Q.C. (with him J. P. Grain and Eldridge) for the prisoner.—Upon a review of all the facts and the evidence, two conclusions are irresistible : first, that there was a real political rising of a large part of the inhabitants, with a real political object ; that it was a state of commotion, and practically of civil war ; that the unfortunate loss of life occurred in the height of the commotion, at the moment when an assault by force was being made upon the Municipal Government house, and when they had broken down the gates ; secondly, that the killing of Councillor Rossi under such circumstances was an offence of a political character. *Primâ facie*, every offence committed under such circumstances is an offence of a political character, and the onus rests upon those who seek to establish the proposition that the offence is not of a political character to show that the act was dictated by motives of personal malice or ill-will. At common law there seems to have been some doubt whether the right of asylum was not an absolute right for any person to come to and go from this country as he pleased, provided he respected and obeyed the laws. That right may have been abused, and have protected undeserving men ; but if this country has erred at all, it has been on the side of extending that right of asylum, lest it

should be found to interfere with free political action in foreign countries. The language of sect. 3 (1) (Extradiction Act, 1870) is intentionally vague, because it was found impossible to frame a definition sufficiently certain and yet sufficiently elastic to comprise all cases which would deserve the name of a political character. When the matter was brought before the House of Commons, Lord Stanley said, on the 3rd day of August, 1866, in reference to the notice proposing to add this clause to the Bill in committee, that if a man were killed in a riot, or in an attempt to excite a tumult or popular insurrection, that would probably be regarded as a political offence; but a difficulty would arise in cases of assassination, and it would be monstrous to say that if any private person were assassinated, in the streets of Paris, for example, and the murderer escaped to England, he might be punished, but that, if the person so assassinated is invested with any political character, then the offence becomes political, and the murderer cannot be given up. Such a position, he said, would be untenable. On the same occasion Mr. John Stuart Mill suggested that political offences should be defined as "any offence committed in the course of or in furtherance of any civil war, insurrection, or political commotions" (Clarke on Extradition, 3rd ed. app. cclix. and cclx. ; 3 Hansard, clxxxiv., 2008 and 2115). That corresponds very closely with the definition given in A History of the Criminal Law of England, vol. 2, p. 71, by Stephen, J., who appears to be the only authority who endeavours to define with some approach to accuracy what is the meaning of the words "political character" in this section. Further light is thrown on the meaning by the views of the Commission on Extradition in 1877 (Clarke on Extradition, 3rd ed., pp. 221, 222, and app. cclviii.). The views of French barristers and American jurists might be cited to the same effect, but it is sufficient to rest my argument on the interpretation of the words suggested by Stephen, J. Upon the facts before the magistrate no adequate conception can be formed of what was the character of this as a political rising. Who can say in that state of disorder and commotion before the Government House what was the exact order or state of things as they happened? But this result follows: that at the time the gates were broken down, and the surging mass of people rushed into the building, there is evidence tending to show that a shot was fired by Castioni which resulted in the death of Rossi. The conclusion is inevitable that the shot was fired in a political rising, and in supposed furtherance of a political rising, at a time when they had not got possession of the Government House, and when there were armed gendarmes inside, who might at any moment offer fatal resistance to the assault by causing loss of life. There is evidence of resistance up to the last, for it is not until after Rossi is shot that the first sign is made of acquiescence in the object of the revolt, by Gianella appearing and waving a white handkerchief. There is not the slightest evidence to support or justify the suggestion

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that this was an act of private vengeance or personal political assassination. The question of the political or non-political character of the act cannot depend upon the cold, impartial opinion of a court of justice as to whether it was or was not necessary at a moment of great popular excitement, with an armed multitude on the one hand, and on the other an armed gendarmerie in possession of the Government House on which assault is being made. It is impossible the Legislature could have intended the question to be determined on such narrow and slender grounds. It may be said that, this being a matter which comes before the magistrate under the statute, and the magistrate having arrived at a certain conclusion, if there was any evidence to support his conclusion, this court cannot disturb it. The authorities for that proposition are *Ex parte Huguet* (29 L. T. Rep. N. S. 41; 12 Cox C. C. 55) and *Reg. v. Maurer* (10 Q. B. Div. 513); but in both those cases the offence charged was admittedly an extradition offence, *i.e.*, fraudulent bankruptcy, and the sole question was, whether or not there was evidence of the fact of fraudulent bankruptcy and nothing more. [DENMAN, J. referred to *Re Elise Counhaye*, 28 L. T. Rep. N. S. 761; L. Rep. 8 Q. B. 410.] As a general rule, no doubt this court is not a Court of Appeal from a magistrate's decision on matters within his jurisdiction ordinarily. On the other hand, there is no case in which the question of what is an offence of a political character has come before this court at all since the Act of 1870; and such a case stands on an entirely different footing, for, in the form in which it comes before the court, it is not strictly an appeal at all from the magistrate's decision, because it is obvious that the case may again and again occur in which when a fugitive criminal is brought before the magistrate in the country in which he for the time is living, he may not have at his command, when the hearing comes on, the means of presenting his whole case before the magistrate. This case is an apt illustration of the point, and therefore it is clear that, as there is the right to move for a *habeas corpus*, that right is not restricted to moving merely on the materials before the magistrate, but it is open to the court to say whether, upon the whole of the facts as they are now brought before the court, this is or is not an offence of a political character. The question is one of law depending upon the facts. The fugitive criminal is exercising a right which the law gives him to come to this court and say, "I demand my relief from custody on the ground that there is no reason by law why I should be detained in custody." In furtherance of that contention he is entitled to bring all the materials that he can before the court, whether they were before the magistrate or not. My propositions are: firstly, that this is not strictly an appeal from the magistrate at all, because it is presented on new materials; secondly, it is an appeal on a question of law whether it is an offence of a political character or not; lastly, if necessary, I say that upon the magistrate's finding, if he found that this was not a political offence, it was a finding contrary to law.

The *Attorney-General*, Sir R. Webster, Q.C. (with him *R. S. Wright*) for the committing magistrate.—If the court were to define offences of a political character in the way indicated by Mr. J. S. Mill as any offence committed in the course of insurrection or political commotion, the consequences would be extremely grave. Supposing a man joins the mob who are going to the Government House to demand entrance, and, being armed with a revolver, thinks fit to shoot from time to time as he is going along, for the purpose of overawing—it may be—some authorities that he wishes to coerce, and that he shoots innocent people who are simply by force of circumstances there, then, according to that view, if the occurrence takes place in the interval of time between the starting of the agitated mob and their demand being acceded to by admission being gained, complete immunity would be given. It is true that, in an application of this sort, the court was in all probability not intended to have its hands tied or its judgment fettered simply and solely by reference to the materials before the magistrate. On the other hand, it could scarcely have been intended that the court should sit in appeal from the magistrate's decision on a question of fact. It is not suggested that the court could not review the matter if the magistrate gave himself jurisdiction by misconstruing the evidence, or if there was no proper evidence. In this particular case it may be open to the court to receive evidence of the general nature of the matter, so as to be able to consider whether or not the offence was of a political character, not for the purpose of varying, but of supplementing that which was before the magistrate, provided it is not an attempt to rebut the facts upon which the magistrate had acted. There is a broad distinction between things which occur in the course of a political insurrection and things which are necessary or are intended for the furtherance of the objects of the political insurrection. It would be a dangerous doctrine to enunciate that those who administer the laws of a country are to put themselves in the position of a young man carried away by his feelings who has taken part in such an agitation as this, for then persons might be allowed to commit acts not necessary for the furtherance of a revolution simply because they are carried away by their feelings and hot blood. It was difficult for the magistrate to have come to the conclusion that the prisoner took part in this matter from political motives, seeing that he had been resident in England for seventeen years; and it is not wise to hold that a person who mixes himself up in every kind of dispute shall have immunity from every violent act to which he is a party. This act was not in furtherance of the political object. Whether you take the materials before the magistrate or the fuller materials before this court, it appears to be the assassination and murder of a man certainly innocent, against whom it is not pretended that the populace at that time had any feeling, who was doing, apparently unarmed, what he thought at the time was his duty,

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by a man who appears to have fired at a time when firing was, to say the least, not necessary to further the ends of the revolution. In the definition of a political offence suggested by Stephen, J., the learned author clearly meant to exclude offences occurring during the time of and not wholly or in part necessary for the purpose of the agitation. The court, therefore, should support the magistrate's order. He referred to Billot, *Traité de l'Extradition*, p. 102; Kirchner on *Extradition*, p. 30; Sir R. Phillimore, *International Law*, vol. 1, p. 441.

The *Solicitor-General*, Sir Edward Clarke (with him *Woodfall*) for the Swiss Government.—It is difficult to conceive that a question of fact upon which the magistrate has taken evidence, and upon which he was entitled to exercise his judgment, is one which this court can review upon affidavit on an application for *habeas corpus*. But this may be said to be a different class of case, and one of three classes of cases which have all now occurred and been argued before the court; first, where there is a question of the provision made by the law of a foreign State with regard to a prisoner not being tried for an offence other than that for which he is surrendered, as in the case of *Woodall* (59 L. T. Rep. N. S. 549 and 841; 16 Cox C. C. 478); secondly, where there is a question whether a person is a natural-born British subject in cases where surrender of that subject is forbidden by the treaty, as in the case of *Guerin* (59 L. T. Rep. N. S. 538; 58 L. J. 42, M. C.); thirdly, where the question is whether the offence is of a political character, as in the present case. Those are all matters which differ from the investigation by the court of the magistrate's conclusion on the matters of fact before him, and may fairly be dealt with by the court upon additional affidavits. What the court has now to determine is a matter of law. The contention that the shooting of Rossi was a political offence is not borne out by the evidence, for it is shown that Rossi was shot when he was not resisting in any way; and the man who does this when there is no resistance of any sort being offered is a stranger unknown to the witnesses in the case. That is not surprising, because he had been seventeen years in London. This stranger comes at a time when it cannot be suggested there was any struggle going on of any kind, and, according to three witnesses, draws a revolver, points it, and deliberately shoots this unarmed man, who is doing nothing whatever in the way of resistance to what is taking place, and directly he has fired and seen Rossi fall says, as if satisfied, "He is down!" and turns to go away. Under such circumstances it cannot be held that it was an act incidental, in the true sense of the word, to what was going on. It was unprovoked and unjustified by any fear of violence or peril on the part of the man who did it, and, if capable of explanation, can only be explained by some personal desire for revenge which, whether directed in such a manner against an individual or against those who represent a political party, is equally a crime within the treaty, and not a political offence.

Woodfall followed.

Sir Charles Russell, Q.C. replied.

DENMAN, J.—Looking at the extreme importance of this case, I should have been disposed, if I had felt any serious doubt whatever as to the course that I ought to pursue, to have taken time, not so much to consider what our judgment should be, as to take care that it should be delivered after time to put it in the best possible shape we could, or even to reduce it to writing. But there are many considerations which apply to cases of this sort. One is that here is a man in custody who has been in custody for a considerable time, and that no greater delay than is reasonably necessary ought to be interposed, if our decision should be one to the effect that he ought not to be in custody any longer. After the very able and the very full and exhaustive discussion that this case has had on the part of the most learned counsel, I am unable to entertain a doubt that upon the whole of this matter it is a case in which we ought, upon this *habeas corpus*, to order that the prisoner should be discharged. Now, there has been no legal decision as yet upon the meaning of the words contained in the Act of 1870, upon the true meaning of which this case mainly depends. We have had many definitions suggested, and great light, I think, has been thrown upon the possible and probable meaning of the words by the kind of arguments that have been addressed to us, applying not only the language of judges, but language used in text-books, language used by great political authorities, and in one case by a most learned philosopher. I think it has been useful in such a case as this that we should hear a discussion as to the possible meaning of the words, as it has occurred that they ought to be construed, to people such as those whose opinions have been cited, and especially I may apply that observation to the case of my very learned brother, whose assistance we have on this occasion in deciding the present case. Now, I do not think that it is necessary or desirable that one should attempt to put it into language, in the shape of an exhaustive definition, exactly the whole state of things, or every state of things, which might bring a particular case within the description of an offence of a political character. I do not think that we should do good by attempting to put it into exact and exhaustive language—language which should never be departed from as far as we ourselves were concerned, or another court in sitting upon cases of this kind. I do not think that is desirable. But I think it is necessary, after the argument we have had, to express an opinion as to one matter, at all events, upon which I do entertain a very strong opinion. That is, that if the description of the offence to be brought within the Act, or the treaties, given by Mr. John Stuart Mill were to be construed in the sense that it really means any act which takes place in the course of a political rising without reference to the object of it, and the intention of it, and other circumstances connected with it, then I should say that that was a wrong definition, and one which could not be

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legally applied to the words used in the Act of Parliament. Sir Charles Russell suggested that "in the course of" was to be read with the words following, "or in furtherance of," and that "in furtherance of" is an *alias* for "in course of." I cannot quite think that was the intention of the writer, or the natural meaning of the expression; but I entirely concur with the observations that have been made by the Solicitor-General, that, in the other sense of the words, if they are not to be construed as merely equivalent expressions, that would be a wrong definition. I think that in order to bring the case within the words of the Act, and to avoid extradition for such an act as an act of murder, which is one of the extradition offences, it must be at least shown that the act which is done is being done in furtherance of—done with the intention of assisting as a sort of overt act, in the course of acting in—a political matter, a political rising, or a great dispute between two parties in the State, as to which is to have the government in its hands—that it must be something of that sort before it can be brought within the meaning of the words used in the Act. There is another point upon which I have an opinion. Sir Charles Russell has argued that in every case it is for the party seeking extradition to bear the onus of affirmatively bringing it within the meaning of those words. On the other hand, it has been contended that, if there be an extraditable offence—a murder committed—the onus is upon the person seeking the benefit of those words to avoid extradition to show a case in which extradition can be avoided. I do not myself think that it is possible to decide a case such as this, or the true meaning of those words, by applying any such test as "on whom is the onus?" I do not think it is intended that, upon a scrap of a *prima facie* case, the one side or the other should have the right of throwing upon the other side the onus of proving or disproving his position. I look at the words of the Act themselves, and I think they are against any such narrow technical mode of dealing with the case. The words of the section which are in question are: "A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character." The section itself begins: "The following restrictions shall be observed with respect to the surrender of fugitive criminals." There is nothing said upon whom is the *onus probandi*, or that it shall be made to appear by this side or that side in such a case. It is a restriction upon the surrender of a fugitive criminal; and, however it appears, if it does appear, that the act that he did was in the judgment of the court an offence which would otherwise be an offence according to the laws of this country, but an offence which is one of a political character, then, wholly irrespective of any doctrine of onus on the one side or the other, that is within the restriction, and he cannot be surrendered. That, I think, is enough to say with reference to the meaning of the words. Certain contentions were raised early in the argument, mainly by the Solicitor-

General, appearing for the Swiss Government, which at the moment brought inquiries from the court as to whether he meant to press his argument as far as he appeared to be doing at the time, and they were really met fairly by the Solicitor-General, and, I think, in every case he has sooner or later abandoned the contentions which he seemed to be making in the sweeping sense in which he appeared to be making them. For instance, he seemed to be saying that, if the magistrate upon this question, as upon any other question, once made up his mind upon the matter, that is a question of fact the court could never deal with, and which it had no jurisdiction to deal with. It would appear to me that that could not be maintained on the very face of the Act itself, which does require that the magistrate should inform the prisoner that he may apply for a *habeas corpus*, and, if he is entitled to apply for a *habeas corpus*, I think it follows that the Court of Queen's Bench, or the Queen's Bench Division of the High Court of Justice, must have power to go into the whole matter, and in some cases, if there be certainly fresh evidence and cogent evidence, it could not say for a moment that it would feel itself to be crippled by the mere fact that the magistrate, upon much less evidence, or perhaps upon the same evidence in some cases it may be suggested, had taken a different view of the matter. That I thought it necessary to state by way of protest against any such view of the very jurisdiction upon *habeas corpus* upon an inquiry as to whether a *habeas corpus* ought to issue. Now, with those observations, and with the observations which have been made by the counsel on both sides, and the admissions that have been made on both sides—to some extent there were admissions on both sides—it seems to me it does come plainly to a simple question of mixed law and fact, mainly indeed of fact, as to whether here the facts are such as to bring the case within the restriction of sect. 3, and to show that it was an offence of a political character. I do not think it is disputed for a moment—it has been contested to some extent, or at all events discussed, but I do not think that now it can be looked upon as in controversy in any way—that there was at this time existing in Ticino a state of things which would certainly show that there was more than a mere small rising of a few people against the law of this, that, or the other State. I think it is clearly made out by the facts of this case that there was something of a very serious character going on, amounting, I should go so far as Sir Charles Russell to say, at the moment in that small community to a state of war. There was an armed body of men who had seized their arms from the arsenal of the State; they were rushing into the municipal council chamber in which the Government of the State was assembled; they demanded admission, admission was refused, some firing took place, the outer gate was broken down, and I think it also appears perfectly plainly from the evidence in the case that this man Castioni was a person who had been taking part in that movement at a much earlier stage. He was an active

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party in the movement ; he had taken part in the binding of a member of the Government some time before he arrived with his pistol in his hand at the seat of the Government. He had gone with multitudes of men, all armed with arms from the arsenal, in order to attack the seat of Government, and I think it must be taken that it is quite clear that from the very first he was an active party, one of the rebellious party who was acting and proceeding on the attack against the Government. Now, that being so, it resolves itself, I think, to a very small point indeed, and a mere question really of evidence, not only of the evidence which was taken before the magistrate, but anything that we can collect from the evidence that we have before us, and from the whole circumstances of the case. Before dealing with the evidence I would merely say one thing about the message which the Solicitor-General objected to having read, and which he conceded to have read after a slight discussion, upon the thorough understanding that we were not going to use that document at all as evidence of any particular fact, but that it would be only used as an important document showing that the Government of the country had themselves looked upon this as a serious political rising, and a serious state of violence by a large body of the people against the Government. I mean so to use it, and have never thought of using it in any other way. I think that was the understanding upon which we allowed it to be read, and I feel that I am not justified in using it for any other purpose. Then it is reduced to the question of whether upon the depositions sent over, and upon the depositions before the magistrate, and upon the fresh facts, if there be any which are brought before us on the affidavits, we think that this was an act done not only in the course of a political rising, but as part of a political rising. Here I must say at once that I assent entirely to the observation of Sir Charles Russell—in fact, I think it was first suggested by myself—that we cannot measure or decide that question merely by considering the act, done at the moment at which it was done, a wise act in the sense of being an act which the man who did it would have been wise in doing with the view of promoting the cause in which he was engaged. I do not think it would be at all consistent with the real meaning of those words in the statute if we were to attempt so to limit it. I mean I do not think it would be right to limit it in the way suggested by the cross-examination of Bruni, namely, that it was not necessary at that time that the act should be done. The question really is whether upon the facts it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part. Now, the only shadow of a suggestion of evidence to the contrary, I think, amounts to very little, and it comes to really a nice disquisition, a very able and powerful disquisition, as to the facts of the case, as to what was taking place at the exact moment at

which the shot was fired. I have carefully followed the discussion as to the facts of the case, and if it were necessary I could go through them all one by one, and point out, I think, that, looking at the way in which that evidence was given, and at the evidence itself, there is nothing in my judgment to displace the view which I have taken of the case, which I do take of the case, that at the moment at which Castioni fired the shot the reasonable presumption is—not that it is a matter of absolute certainty, we cannot be absolutely certain about anything as to men's motives, but the reasonable presumption is—that he at the moment knowing nothing about Rossi, having no spite or ill-will against Rossi as far as we know, fired that shot, that he fired it thinking it would advance, and intending it to be in furtherance of the very object which the rising had taken place in order to promote, and to get rid of the Government, whom he might, until he had absolutely got into that place, and got possession of them to a larger extent than had then taken place, have supposed were resisting the entrance of the people to that place. That I think is the fair and reasonable presumption to draw from the facts of the case. I do not know that it is necessary to give any opinion as to the exact moment, there is some conflict about it. There is evidence of shots fired, after the shot which he himself fired, and putting all those things together, looking at it as a question of fact, I have come to the conclusion that at the time at which that shot was fired he did do it in the furtherance of the unlawful rising, of which at that time he was a party, and an active party, a person who had been doing active work from a very much earlier period, and in which he was still actively engaged. That being so, I think the writ ought to issue, and that we should be acting contrary to the spirit of this enactment, and to the fair meaning of it, if we were to allow him to be detained in custody longer.

HAWKINS, J.—I am of the same opinion. The prisoner is asked to be given up on this, which undoubtedly is an extradition crime under this treaty, that is, for the crime of murder; and undoubtedly he ought to be so given up provided there is *prima facie* evidence of the crime of murder having been committed, unless, indeed, it is shown that the offence of murder in respect of which his surrender is asked is one which was a political offence. Now, the question whether there is *prima facie* evidence that Castioni committed an extradition crime—that is, the crime of murder—is one which I may dispose of in a very few words. Nobody can doubt at all that the man Rossi was shot by a revolver fired by Castioni. About that there seems to be no real question. Under what circumstances he shot him, and when, possibly would be matters which would be capable of argument before the tribunal before whom he might be tried. Of course, if it could be established before the court that he had deliberately taken a pistol, and that he had aimed it at Rossi without any justification of any sort or kind, and had caused the death of Rossi, there would

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Re CASTON. have been an abundant case, a case upon which he ought to have been tried according to our law of the crime of murder, and punished in respect of that crime. But it is said, and said I think rightly, that he ought not to be given up upon this ground; that the offence of which he was guilty, if he was guilty of that offence, was of a political character. That is, the murder with which he was charged was in itself of a political character. Now, the matter has been before the magistrate, and the magistrate, acting upon the information and the evidence before him, has come to the conclusion that the two things exist: first of all, that there is abundance of evidence to justify him in committing the man to be tried for murder—that is to say, there would have been had his crime been committed in this country; and secondly, he has come to the conclusion rightly or wrongly, on which I shall have a word or two to say, that the offence was not of a political character, and that therefore he ought to be given up. The matter now comes before us—I will not say to review the whole of his decision, but to ask ourselves as to whether or not, having regard to the whole of the circumstances which are now brought to our attention, and which are proved by the depositions and other evidence in the case, we come to the same conclusion as the magistrate, or whether we deliberately arrive at an opposite conclusion. Now it seems to me, for the reasons which were stated in the course of the arguments, that, if the man has a right to his *habeas corpus*, or to move for a *habeas corpus* in order that the case may be reviewed, or for the purpose of getting his discharge, it would be an absurdity to say that he might not enter into those matters which showed that he had been guilty of no offence at all; and I should have said that by no means was the matter concluded by the magistrate's decision that he be committed for trial, because the magistrate does not sit when he is committing for trial as a magistrate sitting finally to dispose of the case and to give judgment upon it, but he states his opinion that there is a *prima facie* case, and upon that ground he signs his warrant of committal. Again, with reference to the question of whether the magistrate has a right to deal with a man, and to deal with his objection to being remitted for trial in respect of an extradition crime, I may be wrong; but I myself entertain no doubt in my own mind that the magistrate has no right and no jurisdiction to find finally, as against the prisoner, whether or not he has committed that crime which he is charged with having committed, whether that is of a political character. Now, the sections of the Extradition Act to which I desire to call attention are, first, sect. 3 (1) that a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, such as treason or other matters, or if he prove to the satisfaction of the police magistrate that the requisition for his surrender has in fact been made with a view to try the prisoner for an offence of a political character. These latter words undoubtedly tend to

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show that Sir Charles Russell was wrong in the view that he takes that the onus is upon those who seek for the extradition to show that the offence committed is not of a political character, because it must be upon the person who seeks to be discharged on the ground that his surrender is in fact asked for with the view to punish him for an offence of a political character; the onus of establishing that is upon the alleged criminal himself. Now, sect. 9 and sect. 10 seem to me to have some bearing on the question as to whether or not a magistrate is called upon under this section finally to give any decision at all upon the question of whether or not the offence with which a man is charged is of a political character. First of all, the 9th section enacts that, "When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England." If he were charged before the magistrate with an indictable offence committed in England, the question of whether or not the offence for which he was indicted was of a political character or not would make no difference. But under this section the magistrate is to deal with him as though the offence charged were for an indictable offence committed in England. Then the section goes on to say, "the police magistrate shall" not adjudge that the offence is of a political character, but he "shall receive any evidence which may be tendered to show that the crime of which the prisoner is accused, or alleged to have been convicted, is an offence of a political character, or is not an extradition crime." It seems to me that the language of this part of the 9th section in itself shows that the onus is on the person who can absolve himself or exonerate himself from a liability of being handed over to the Government of the territory within which the crime was committed. I find here, in furtherance of what I am about to say about this question of the jurisdiction of the magistrate, sect. 10, which is to my mind by no means unimportant: "In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would according to the law of England justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged." It does not seem to give the magistrate himself the power of dealing with the matter other than this: he is to consider whether the crime is one which, if committed in England, would have made it imperative upon him in discharging his duties to commit him to prison. If so, he is to commit him to prison; but he is, as I have already shown in sect. 9, obliged to receive any evidence which may be tendered to show that the crime is of a political character, and

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that is analogous to the provisions to be found, I think it is, in Mr. Russell Gurney's Act, which makes it the bounden duty of a magistrate, if a prisoner wishes to call evidence in support of a defence which he intends to set up when he comes to be indicted, it makes it imperative upon the magistrate to take that evidence and hand him over to the tribunal before whom he is ultimately to appear. In furtherance of this view that I take, I read the 11th section, "If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*," which may very well mean this: "I have power to commit you to prison, because I am satisfied that you have been guilty of a crime to which the extradition law and treaty applies; you have a right to have any evidence taken on your behalf to show that you are a criminal who ought not to be sent out because your offence, even if committed, was of a political character. I will take the evidence for you. You have fifteen days to make application for your release, if you think fit to move for a *habeas corpus*." What follows afterwards shows that it is not the magistrate who is to determine these matters, but it is the Home Secretary who is to determine whether or not ultimately the prisoner is to be sent abroad, because the second part of the 11th section goes on to say, "Upon the expiration of the said fifteen days, or, if a writ of *habeas corpus* is issued, after the decision of the court upon the return to the writ as the case may be, or after such further period as may be allowed in either case by a Secretary of State, it shall be lawful for a Secretary of State, by warrant under his hand and seal, to order the fugitive criminal (if not delivered on the decision of the court), to be surrendered to such person as may in his opinion be duly authorised to receive the fugitive criminal." These are the provisions of the Act. I think they are quite sufficient certainly to satisfy me that the magistrate's decision is by no means binding either in point of law or in point of fact, and that when these matters come to be considered upon the *habeas corpus*, if the judges have to consider the case, they must consider the case as it is before them at the time the rule is discussed, and I think that we are not bound, in considering the matter, by, though we pay respect to; what the magistrate's views were; we give weight to them and pay consideration to them, but not at the expense of the criminal, if upon the whole state of things before us we come to the conclusion, either that the crime has not been committed, and that there is no *prima facie* evidence of it, or that the criminal ought not to be sent out to his own Government for the purpose of being dealt with by reason of his offence being, though a crime, a crime of a political character. Of course, I do not myself mean to travel through the facts, which seem to me to be simple enough. One may concede that there was evidence of a crime, concede that if it were not of a political character the man ought to be sent out

under the warrant from the Secretary of State; but that brings me to the question whether, upon the present occasion, even assuming there to be the most cogent evidence of the crime of murder, he ought to be sent out, having regard to that provision which says that he shall not be so if the offence with which he is charged is one of a political character. Now, I entirely dissent—and I think all reasonable persons would dissent—to the proposition that any act done in the course of a political rising, or in the course of any insurrection, is of a political character. Everybody would agree, I think, with this, that it is not everything done during the period that a political rising exists that would be said to be, or could be said to be, of a political character. A man might be joining in an insurrection, joining in a rising, joining in that which in itself is a pure political matter, but notwithstanding that he were engaged in a political rising, if he were deliberately for a matter of private revenge, or for the purpose of doing injury to another, to shoot an unoffending man, perhaps standing on his doorway, because he happened himself to be one of an insurgent crowd and had a revolver in his hand, no reasonable man would question that he was guilty of the crime of murder, because that offence so committed by him could not be said to have any relation at all to a political crime, namely, a crime which in law ought to be punished with the punishment awarded to such a crime. Now what is the meaning of crime of a political character? I have thought over this matter very much indeed, and I have thought whether any definition can be given of the political character of the crime—I mean to say, in language which is satisfactory. I have found none at all, and I can imagine for myself none so satisfactory, and to my mind so complete, as that which I find in a work which I have now before me, and the language of which for the purpose of my present judgment I entirely adopt, and that is the expression of my brother Stephen in his History of the Criminal Law of England, in the 2nd volume, at p. 71. Though I have read the earlier parts, at this period of the day I cannot do more than refer to the interpretations other than those with which he agrees which have been put upon this “political character,” but I adopt his definition absolutely: “A third meaning which may be given to the words, and which I take to be the true meaning, is somewhat more complicated than either of those I have described. An act often falls under several different definitions. For instance, if a civil war were to take place, it would be high treason by levying war against the Queen. Every case in which a man was shot in action would be murder. Wherever a house was burnt for military purposes arson would be committed. To take cattle, &c., by requisitions would be robbery. According to the common uses of language, however, all such acts would be political offences, because they would be incidents in carrying on civil war. I think, therefore, that the expression in the Extradition Act ought, unless some

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better interpretation of it can be suggested, to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes if those crimes were incidental to and formed a part of the political disturbances. I do not wish," it goes on to say, "to enter into details beforehand of the subject which might enter into judicial consideration." The question has come under judicial consideration, and having had the opportunity before this case arose of carefully reading and considering the views of my learned brother, having heard all that can be said upon the subject, I adopt his language as the definition that I think is the most perfect to be found or capable of being given, as to what is the meaning of the phrase which is made use of in the Extradition Act. Now, were these acts done by Castioni of a political character? That there was a general rising of one party there can be no doubt. They were as it were levying war against the Government. That they anticipated violence and violent resistance there can be little doubt. The very fact that five men were bound together of the opposite party to this, and put in front of those who were making the attack, shows the object: "We expect an attack to be made upon us; we expect personal violence, and these five persons are the most likely if they are put in front to deter those who would offer violence to us from doing so." Not that they thought it would be absolutely so, because they went prepared, armed themselves, some with guns and others with revolvers, to make this attack on the Government House. I think it is immaterial utterly whether or not one gate was broken open, or whether the gates had been burst open or not. The question really is, whether this was an act done by the prisoner in his character of a political insurgent at that time, and I do not think it signifies whether or not he had come into Bellingtona on the day before or on the morning on which this occurrence took place. If he was honestly, as he felt himself to be, a citizen of the place, and was, as such, taking his part in a movement of a political character which he thought was for the benefit, or which he chose to join in because he thought it was for the benefit, of the political side to which he desired to attach himself, I cannot come to the conclusion that he is to be deprived of the privilege of the refuge afforded to him simply because, even after the palace was broken into, having a revolver in his hand he did make use of it in a way which is very much indeed to be deplored; because I find no evidence which satisfies me that his object in firing at Rossi was to take that poor man's life, or to pay off any old grudge which he had against him, or to revenge himself for anything in the least degree which Rossi or anyone of the community had ever personally done to him. When it is said that he took aim at Rossi there is not a particle of evidence that Rossi was even known to him by name. Of course his name was known to those who were thereabout, but there is not a particle of proof that his name was ever known to the prisoner who took this part. I cannot help

myself thinking that everybody knows there are many acts of a political character done without reason, done against all reason, but at the same time one cannot look too hardly and weigh in too golden scales the acts of men hot in their political excitement. We know that in heat and in heated blood men often do things which are against and contrary to reason, but, none the less, an act done of this description may be done for the purpose of furthering and in furtherance of a political act and a political rising, even though it is an act which may be deplored and lamented as even cruel and against all reason by those who can calmly reflect upon it after the battle is over. For the reasons I have expressed, I am of opinion that this rule ought to be made absolute, and that the prisoner ought to be discharged.

STEPHEN, J.—I am of the same opinion, and after the judgments which have been given I shall give my reasons for it in the fewest possible words. I published, some years ago, a book which has been considerably quoted to-day, and in the passage in which I state my views upon this subject I gave what appeared to me to be the true interpretation of the expression “political character.” It is very easy to give it too wide an explanation. I think that my late friend Mr. Mill made a mistake upon the subject, probably because he was not accustomed to use language with that degree of precision which is essential to everyone who has ever had—as I have had on many occasions—to draft Acts of Parliament which, although they may be fit to be understood, people continually try to misunderstand, and in which, therefore, it is not enough to attain to a degree of precision which a person reading in good faith can understand, but you must attain, if you possibly can, to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it. Now, having given you my view upon that subject, I really have no more to say, and I shall say no more with regard to the interpretation of the Act of Parliament. I will say only with respect to the facts which have taken place, that it is obvious to my mind that the shooting on this occasion took place in a scene of very great tumult, at a moment when, if a man decided to use deadly violence, he had very little time to consider what was happening and to see what he ought to do, and that therefore he was committing an act greatly to be regretted. On the whole, I feel no doubt that the *habeas corpus* ought to go, and that the prisoner ought to be set at liberty.

Prisoner discharged.

Solicitors: in support of the rule, *W. H. Phelan*; for the Swiss Government and the committing magistrate, *The Solicitors to the Treasury*.

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QUEEN'S BENCH DIVISION.

Wednesday, January 21, 1891.

(Before POLLOCK, B. and CHARLES, J.)

WESTMORE (app.) v. PAINE (resp.). (a)

Justice of the peace—Appeal—Special case—Service of application to state case—Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33—Summary Jurisdiction Rules, 1886, r. 18.

A court of summary jurisdiction, composed of five justices, having convicted the appellant, an application in writing was made to two of the justices to state a special case, and a copy of such application was left with the clerk of the court.

Held, that the application to the two justices was not an application to the court within the meaning of the Summary Jurisdiction Act, 1879, s. 33, and the Summary Jurisdiction Rules, 1886, r. 18; and that the court had therefore no jurisdiction to hear a case stated by the two justices to whom the application had been made.

THIS was a case stated by two of Her Majesty's justices of the peace for the borough of Dover, under the statutes 20 & 21 Vict. c. 43 and 42 & 43 Vict. c. 49, s. 33, subject to the preliminary point whether a legal application was made so as to give the said two justices jurisdiction to state such case upon questions of law which arose on the hearing of the information hereafter referred to.

At a court of summary jurisdiction, composed of five justices of the borough of Dover, of whom the justices who stated the case were two, sitting at the sessions-house in the borough of Dover, on the 2nd day of August, 1890, an information preferred by the respondent against the appellant was heard and determined.

The information was laid under the provisions of sect. 243 of the Merchant Shipping Act, 1854, against the appellant for neglecting to perform his duty as a seaman on board the British steamship *Empress*.

Both the appellant and respondent were represented by counsel.

After hearing the evidence the court unanimously convicted the appellant of the offence charged in the information, and under the power given them by sect 4 of the Summary Jurisdic-

(a) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

tion Act, 1879 (42 & 43 Vict. c. 49), to impose a fine in lieu of imprisonment they adjudged the appellant to forfeit and pay the sum of 5*l.* 5*s.* The conviction was signed by all the five justices constituting the court. Immediately after the decision of the court had been given the appellant's counsel applied orally for a case to be stated on certain questions of law which arose during the hearing of the information, and the court consented to accede to the application.

On the 8th day of August, being within seven days after the hearing of the information, the appellant served on two of the justices a written application, of which the following is a copy :

To John Lade Bradley, Esq. and John Marshall, Esq., two of Her Majesty's justices of the peace for the borough of Dover in the county of Kent.—In the matter of an information wherein George William Weller Paine was the informant, and I the undersigned Frank Westmore, of 4, Portland-place, Dover aforesaid, was the defendant, heard before and determined by you at the petty sessions held at the Townhall, Dover, aforesaid, on the 2nd day of August, 1890, I being dissatisfied by your determination of the said information as being erroneous in point of law, do hereby, pursuant to the statute 42 & 43 Vict. c. 49, s. 33, make application to you to state a special case setting forth the facts of the case and the grounds on which the proceeding was questioned, in order that I may obtain the opinion of the Queen's Bench Division of the High Court of Justice thereon.—Dated this 8th day of August, 1890.

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This written application was addressed to two only, and not to all the five justices forming the court of summary jurisdiction by whom the information was heard and determined.

The appellant also, on the 8th day of August, served a copy of the application upon the clerk of the court, and the appellant entered into a recognisance as is required by the statute in that behalf.

Having regard to the case of *Lockhart v. Mayor of St. Albans* (21 Q. B. Div. 188), and the cases cited therein, the two justices were doubtful if the statute 42 & 43 Vict. c. 49, s. 33, and rule 18 of the Summary Jurisdiction Rules, 1886, made under that Act, have been complied with so as to give them jurisdiction to state this case, and they accordingly stated the case subject to the opinion of the court whether or not the two justices had jurisdiction so to do.

The facts as proved before the court of summary jurisdiction were then set out.

The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33, provides as follows :

(1.) Any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the court to state a special case setting forth the facts of the case and the grounds on which the proceeding is questioned, and if the court decline to state the case, may apply to the High Court of Justice for an order requiring the case to be stated.

(2.) The application shall be made and the case stated within such time and in such manner as may be from time to time directed by rules under this Act, and the case shall be heard and determined in manner prescribed by rules of court. . . .

The Summary Jurisdiction Rules, 1886, provide :

Rule 18. An application to a court of summary jurisdiction, under sect. 33 of the Summary Jurisdiction Act, 1879, to state a special case, shall be made in writing, and

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a copy left with the clerk of the court, and may be made at any time within seven clear days from the date of the proceeding to be questioned, and the case shall be stated within three calendar months after the date of the application and after the recognisance shall have been entered into.

Corrie Grant for the appellant.—The question raised by the magistrates is, whether, the application to state a special case under sect. 33 of the Summary Jurisdiction Act, 1879, must be made to all the justices who constituted the court, or whether an application to two of the justices is sufficient compliance with the statute. [POLLOCK, B.—The question is, whether we have jurisdiction to hear the case. We cannot give ourselves jurisdiction, if we have not already got it, merely because both parties desire that we should hear the case.] All the five justices have consented to the case being stated. [CHARLES, J.—Is not the objection raised by the justices valid? The statute says that the application must be served upon the court; does not that mean all the justices who constituted the court?] The case might have been heard by two justices, and they might have stated a case. [CHARLES, J. referred to *Lockhart v. Mayor of St. Albans*, 21 Q. B. Div. 188.] In that case there had been no application in writing at all to any of the justices who had heard the case, but merely a written application to the clerk. It has been held also that an application addressed to the justices generally without naming them is not sufficient: (*Curtis v. Buss*, 37 L. T. Rep. N. S. 533; reported *sub nom. Ex parte Curtis*, 3 Q. B. Div. 13.) In this case the application bore the names of the two justices to whom it was made. The same remarks apply to the case *South Staffordshire Waterworks Company v. Stone* (57 L. T. Rep. N. S. 368; 19 Q. B. Div. 168). [CHARLES, J.—It seems to me that the court must mean all the persons who have concurred in the judicial act dealing with the question with reference to which the case is to be stated.]

Finlay, Q.C. (with him *Manafield*) for the respondent.—This point has been raised by the justices and not by the respondent, who is desirous of having the case heard upon its merits.

POLLOCK, B.—As both the parties to this appeal are anxious to have the decision of the court upon the points that are raised, I regret that we have no power to hear the case. We are bound by the rules which provide that certain steps must be taken before we can hear a special case such as this, and however much we may desire to assist the parties it cannot affect the conditions precedent laid down by the Act of Parliament. This form of appeal from a court of summary jurisdiction by way of a special case is entirely a creature of statute, and the Legislature has used language with reference to the mode of procedure which is extremely clear. It is provided by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33, that "any person aggrieved who desires to question a conviction of a court of summary jurisdiction on the ground that it is erroneous in point of law or is in excess of jurisdiction, may apply to the court to state a special case."

The second part of the same section says: "The application shall be made and the case stated within such time and in such manner as may be from time to time directed by rules under this Act." Now, by rule 18 of the Summary Jurisdiction Rules, 1886, which were made under that Act, it is provided as follows: "An application to a court of summary jurisdiction, under sect. 33 of the Summary Jurisdiction Act, 1879, to state a special case, shall be made in writing, and a copy left with the clerk of the court, and may be made at any time within seven clear days from the date of the proceeding to be questioned; and the case shall be stated within three calendar months after the date of the application." Leaving a copy of the application with the clerk to the justices, which was done in this case, is merely a matter of convenience, and cannot affect the question before us. The application is to be made to the court according to the terms of the statute, and it must be made to the justices who constitute the court. It is obvious that, if a person desires a case to be stated, he must serve each justice who has to state the case with his application. The facts in the present case were these: An information was laid against the present appellant, and upon the hearing he was convicted and fined. As soon as the decision of the court was given, counsel who appeared for the appellant orally applied for a case to be stated upon certain questions of law which arose during the hearing; but that application is not a sufficient compliance with the requirements of the statute, and subsequently the notice in writing was served, not upon the five justices who constituted the court, but upon two only of them at their private residences. The two justices who were so served have stated a case raising the points which the parties desired to have decided by this court. But that does not comply with the requirements of the statute, which says that the case shall be stated by the court. If the court happened to consist of four justices, two of whom decided one way and the other two the other way, it could never have been intended that either two of the justices should be able to state a case without the concurrence of those who differed from them. In *South Staffordshire Waterworks Company v. Stone* (57 L. T. Rep. N. S. 368; 19 Q. B. Div. 168) the court considered that the application in writing to the court was a condition precedent which must be complied with before the case could be heard. Lord Esher, M.R. also clearly thought in *Lockhart v. Mayor, &c., of St. Albans* (21 Q. B. Div. 188) that the court meant the court that decided the case. It is clear, therefore, that this case is not stated so that we can hear it, and the appeal must therefore be dismissed.

CHARLES, J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellant, *Shaen, Roscoe, Massey, and Co.*

Solicitors for the respondent, *Bower, Cotton, and Bower, for Mowll and Mowll, Dover.*

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PAINE.
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Appeal—
Special case—
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application
to state case
—42 & 43
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s. 33.

QUEEN'S BENCH DIVISION.

Jan. 28 and 29.

(Before POLLOCK, B. and CHARLES, J.)

BUDD v. LUCAS. (a)

Merchandise Marks Act, 1887—Trade mark or description—Application of false trade description—Delivery of invoice with the goods—Admissibility of evidence of previous transactions—Master and servant—Criminal liability—Onus of proof—50 & 51 Vict. c. 28, s. 2, sub-sect. 1 (d); s. 3, sub-sect. 1; s. 5, sub-sect. 1 (d), and sub-sect. 3.

The respondent sold and caused to be delivered to the appellant six casks of beer, and at the same time or immediately afterwards delivered to him an invoice describing the six casks as barrels, a barrel meaning, according to the custom of the trade, thirty-six gallons. The appellant, finding that the measure was short, preferred an information against the respondent for unlawfully applying a false trade description contrary to the Trades Mark Act, 1887. The justices were satisfied that short measure had been delivered, but refused to receive evidence of previous short deliveries, and considered that the respondent had no intention to defraud. They held that the delivery of the invoice was not a false trade description within the Act, and dismissed the information, but stated a case:—

Held (remitting the case), without expressing an opinion whether the justices ought to have convicted or not on the evidence before them, that the delivery of the invoice with the goods might, under the circumstances, be an application of a false trade description within the meaning of the statute; that the justices were wrong in excluding the evidence tendered as to previous short deliveries; and that the old law that a master is not liable criminally for the acts of his servant has not been altered by the Merchandise Marks Act, 1887, with respect to offences thereunder, except that the onus is placed on the defendant of showing that he acted without intent to defraud.

CASE stated by justices of the peace for the city of Coventry, under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49.

The appellant, George Budd, a licensed victualler occupying a public-house in Coventry, laid an information before the justices of that city against the respondent, M. P. Lucas, a brewer,

(a) Reported by ALFRED H. LEFROY, Esq., Barrister-at-Law.

charging him that he did on the 16th day of January, 1890, unlawfully apply a certain false trade description, namely, "barrel" to certain goods, to wit, a certain cask of beer false as to the measure or gauge thereof, contrary to the Merchandise Marks Act, 1887.

The charge was heard before the magistrates at the petty sessions, and the information was dismissed; but subsequently, on the application of the appellant, the magistrates stated a case.

The facts of the case are shortly as follows: On the 16th day of January, 1890, the respondent caused to be delivered to the appellant six barrels of beer. The barrels were taken into the cellar of the appellant by the respondent's carman, and an invoice in the handwriting of the respondent's clerk was left with the appellant's wife at or immediately after the delivery of the barrels. On the invoice were the following words: "Mr. Budd, Coventry.—Bought of Lucas, Blackwell, and Arkwright.—6 Brls. XXXK. 14l. 8s." One of these barrels was found to be deficient in size, and when it had been emptied the appellant measured it with an Imperial gallon measure, and found that, instead of thirty-six, he could not get quite thirty-four gallons of water in.

On a previous occasion the appellant had had reason to complain of the delivery of short measure, and on the 3rd day of November, 1889, he had written to the respondent's firm that, in consequence of a rumour, he had had one of the respondent's barrels measured with a standard measure, and that he had found that it only contained thirty-four gallons, full up to the top, without allowing any space for hops, so that there was at least two and a-half gallons short measure.

At the hearing before the magistrates it was admitted by the respondent that the expression a "barrel" of beer means, according to the custom of the trade, a cask containing thirty-six gallons.

On behalf of the appellant evidence was tendered of a previous delivery of barrels containing short measure; but this was objected to, and the Bench refused to admit the evidence.

For the defence and on behalf of the respondent evidence was given that, after the letter of the 3rd day of November, particular instructions were given to the coopers employed by the respondent not to serve out barrels unless they were of full size.

In reply on behalf of the appellant evidence was tendered to prove that barrels deficient in size were sent with every lot of beer that he had received since the 3rd day of November. But this was objected to, and the magistrates allowed the objection. On behalf of the appellant it was contended that the sending of the invoice with the goods was an application of a false trade description within the statute; and further, that respondent was criminally liable for the acts of his servants. The justices were satisfied from the evidence that the barrel, one of the said six

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barrels which formed the subject of the present charge, would not contain thirty-six gallons, being too small to hold that quantity, and that the appellant did not in fact receive thirty-six gallons of beer; but, after hearing the evidence and the arguments laid before them, they said they were of opinion that this was not a case coming within the meaning of the Merchandise Marks Act, 1887, and, although satisfied the barrel in question was sent out with short measure, were of opinion that there was no intention on the part of the respondent to defraud the appellant. They held that the mere delivery of the invoice was not a sufficient application of a false trade description within the terms of the statute, and accordingly dismissed the summons.

The question was, whether the justices were right in dismissing the summons, and the following questions of law were submitted to the High Court for decision: 1. Whether the delivery of the invoice with the barrels under the circumstances above stated was an application of a false trade description within the meaning of the Merchandise Marks Act, 1887? 2. Whether the justices were right in excluding the evidence tendered as to previous transactions between the parties? 3. Whether they were right in refusing to allow the two witnesses named to be recalled to give evidence in reply? 4. Whether, assuming the case is within the meaning of the Act, the respondent was responsible criminally for the acts of his servants?

Sect. 2, sub-sect. 1 (*d*) of the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28) enacts that every person who "applies any false trade description to goods" shall be guilty of an offence against this Act.

Sect. 3, sub-sect. 1, defines, for the purposes of the Act, the expression "trade description" as meaning "any description, statement, or other indication, direct or indirect, as to the number, quantity, measure, gauge, or weight of any goods;" and the expression "false trade description," as meaning "a trade description which is false in a material respect as regards the goods to which it is applied."

Sect. 5, sub-sect. 1 (*d*) enacts that a person shall be deemed to apply a "trade description" to goods who "uses . . . a trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that . . . trade description."

Poland, Q.C. (W. Graham with him) for the appellant.—This case comes within sect. 5, sub-sect. 1, of the statute. The court is not here dealing with an ordinary trade mark, but with an actual description. The Act of 1862 might not have covered this case, but the Act of 1887 went much further than the old Act. It is true the invoice was not nailed or attached to the barrel, but it was a description indicating the "quantity, measure, or gauge" within sub-sect. 1 of sect. 3, and was "applied" or "used in a manner calculated to lead to the belief" that the barrel contained more beer than it actually did, and as such it

was a sufficient false trade description to come within the meaning of sect. 5, sub-sect. 1. It is not necessary for the appellant to show that the delivery of short measure was intentional on the part of the respondent, nor is it necessary for him to prove any intent to defraud: (*Wood v. Burgess*, 61 L. T. Rep. N. S. 593; 24 Q. B. Div. 162.) The magistrates were wrong in not admitting the evidence tendered by the appellant as to previous short deliveries. It may be that the respondent would not be criminally liable for the carelessness of his servants in not filling the casks, or for the servant stealing beer out of the casks; but here the respondent actually supplied his servant with barrels to fill which would not contain the proper measure, and was thus, it may be said, actually carrying on his trade with false measures. The magistrates were therefore wrong in dismissing the summons, and the case should be remitted to them.

Channell, Q.C. (*Hon. A. Lyttelton* with him) for the respondent.—This Act applies to labels, but not to invoices or bought and sold notes. The whole Act must be read, and the general purport of the Act is to prevent the putting upon the market goods fraudulently marked. The false description must be fixed to the goods. The word “apply” means a physical connection. Here the contents were not marked upon the barrels. A breach of the Act cannot be committed by a description in an invoice which is addressed to a specific person. The Act aims at descriptions addressed to any persons into whose hands they may come. Sub-sect. 1 of sect. 5 must be construed with a view to the whole object of this Act, and limited accordingly; the words in this sub-sect. (d) are very general and very large, and must be controlled by the general policy of the Act. The respondent had no knowledge that the cask was deficient in measure; he had acted *bonâ fide* in the matter, and could not be held criminally liable for the acts of his servant: (*Ohisholm v. Doulton*, 60 L. T. Rep. N. S. 966; 22 Q. B. Div. 736.)

Poland, Q.C. replied, and, in answer to a question put by the Bench, contended that in this case, if the false description was used and applied, the criminal intent must be presumed, and the onus of disproving it was cast upon the respondent.

POLLOCK, B.—This case raises a very important question, and the main point the court has here to decide is, whether the Merchandise Marks Act, 1887, applies to such a case as has been set forth. In this case the respondent, who is a brewer, sent out six casks of beer, which were delivered to the appellant, and at the same time, or immediately after, caused to be delivered an invoice describing them as six barrels, and the charge was that in so doing he had infringed the Merchandise Marks Act of 1887 by applying “a false trade description to goods.” This invoice is said to have been used as a “trade description,” and it is alleged that the goods in relation to which it was used were falsely described. It is a question of fact to some extent whether this invoice did cause an offence within the Act; that is, whether

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it was used as a trade description. The magistrates, however, have not received the whole of the evidence offered them, and we in this court are not prepared to say whether they ought to have convicted on the evidence before them. The question whether such a case comes within the Act of 1887 is most important. No such invoice was pointed at in the earlier Acts, although in the Act of 1862 it was the intention of the Legislature to punish those who used fraudulent trade marks of any sort. That Act related to ordinary trade marks. The Act of 1887, however, goes much further, and cannot be confined to cases comprised within the former Acts. It uses language not applicable to trade marks, and employs for the first time the words "trade description." Sect. 3 defines "trade description" as "any description, statement, or other indication, direct or indirect, as to the number, quantity, measure, gauge, or weight of any goods." This is something new. And, again, in sect. 5, which deals with the application of false trade descriptions, it is enacted that a person shall be deemed to apply a "trade description" who uses a trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade description. Here we have the case of a person who "used" a trade description "in connection with" particular goods. It would be cutting down the Act for me to say that the invoice sent with the goods could not be described as, or included in the words "trade description." I therefore am of opinion that the Act may apply in such a case as this. Then arises another question, namely, whether the Act complained of was done with the knowledge of the person charged with doing it. Evidence was tendered as to former short deliveries, with the object of showing that the false trade description was used with the knowledge of the respondent. This evidence the magistrates refused to admit, and in so doing, I am of opinion, acted wrongly. The evidence was undoubtedly admissible, for it might have shown that the respondent was aware of what occurred. As to the last question, whether a master is criminally responsible for the acts of his servants, I can only say that the old law on that subject, namely, that a master is *primâ facie* not liable criminally for the act of his servant, has not been altered by the Merchandise Marks Act of 1887, with respect to offences thereunder, except that the onus is placed on the defendant of showing that he acted without intent to defraud.

CHARLES, J.—I am of the same opinion. As to the first question, all I can say is that in such a case the delivery of the invoice may constitute an offence within the Act, and under proper circumstances a conviction might be sustained. No doubt no description of the measure was affixed or applied to the barrels; but sect. 5 enacts that a person who uses a trade mark in connection with the goods shall be deemed to "apply" a trade description to such goods. It is clear that by sub-sect. (d) of sect. 5 something

more is meant than mere physical connection with the goods, and therefore I think the use of a description in the invoice and the delivery of such invoice with the goods might be a use calculated to lead to the belief that the goods were designated by that description. But, as the whole facts have not come before us, I cannot say positively that they are such as to sustain a conviction. I am of opinion that the magistrates were wrong in refusing to receive the evidence tendered, and the case must be remitted to them with an intimation that the delivery of the invoice might be an application of a false trade description within the meaning of the Merchandise Marks Act, 1887.

Case remitted.

Solicitors for the appellant, *Sharpe, Parker, Pritchard*, and *Sharpe*, agents for *Hughes and Masser*, Coventry.

Solicitors for the respondent, *Cope and Co.*, agents for *Wright and Hassall*, Leamington.

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QUEEN'S BENCH DIVISION.

Thursday, Feb. 26, 1891.

(Before CAVE and WILLS, JJ.)

Re BELLENCOUTEE. (a)

Habeas corpus — Extradition crime — Extradition Acts, 1870 (33 & 34 Vict. c. 52) and 1873 (36 & 37 Vict. c. 60)—Evidence required to justify commitment under—Embezzlement and fraud as bailee or agent—Misappropriation of money by notary—Larceny Act, 1861 (24 & 25 Vict. c. 96), ss. 75, 76.

A French subject was arrested in Jersey on a warrant charging him with "embezzlement in France as an agent or bailee." The French diplomatic representative in London thereupon requisitioned the Secretary of State for his surrender on the ground that he was accused of the crime of "fraud by a bailee" which was an extraditable offence under the Extradition Acts, 1870 and 1873.

Sir John Bridge, the police magistrate sitting at Bow-street, committed him to take his trial in France upon a warrant charging him with "embezzlement and fraud as an agent or bailee."

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

*Re BELLEN-
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—*Evidence*—

Embezzlement
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appropriation
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The foreign warrant, issued in France, charged him with having embezzled or misappropriated sums of money which had been delivered to him in his capacity of notary."

Held, that there was nothing in the technical point that the warrants were not in proper form, and that they differed the one from the other; that the term used in the French warrant, abus de confiance, or fraudulent misappropriation of money deposited with the prisoner in his capacity of notary is a perfectly good offence within the schedule to the Extradition Act, 1870, and also under art. 3 of our Treaty with France, clause No. 18 of the list of extradition crimes.

Held also, that all that is necessary is to call the attention of the magistrate to what he is required to do in the case, and that it is sufficient if his attention is drawn to a particular crime under the Act, and it is for the magistrate to inquire whether the evidence laid before him establishes a primâ facie case of what would be a crime by English law, and such as would justify him in committing the prisoner for trial in an English Court.

Held also, that the facts disclosed on the depositions warranted the magistrate in coming to the conclusion that, as regards four of the charges, there was a primâ facie case under sect. 76 of the Larceny Act, 1861.

Held, further, that, under this section, embezzlement in the sense of fraudulent misappropriation may be committed by others than clerks or servants, i.e., by bankers, bailees, or agents; and that there was nothing in the objection that, because the magistrate had committed on all the nineteen charges, the warrant would not be good as to all of them and was therefore bad as to all.

THIS was a French extradition case, and came before the court upon an application by the prisoner Bellencontre for a writ of *habeas corpus* with a view to his discharge, on the ground that the crime of which he was accused, viz., "fraud by a bailee," was not an indictable offence within the Extradition Acts, 1870 and 1873."

The facts were as follows: On the 16th day of December, 1890, the prisoner David Henri Bellencontre, described as a notary of Tour, Normandy, was arrested at Jersey, upon a warrant, charging him with embezzlement in France as an agent or bailee; he was brought to England, and upon the requisition of M. Waddington, the diplomatic representative of the French Republic, for his surrender on the ground that he was accused of the crime of fraud by a bailee within the jurisdiction of the French Republic, the Right Hon. Henry Matthews, one of Her Majesty's principal Secretaries of State, made an order, requiring Sir John Bridge, the chief magistrate at Bow-street, to proceed in accordance with the Extradition Acts 1870 and 1873.

On the 18th day of December, 1890, Sir John Bridge committed the prisoner to take his trial in France on a charge of having committed the crimes of "embezzlement and fraud as an agent or bailee" within the jurisdiction of the French Republic.

The warrant issued in France for the apprehension of the prisoner charged him with having "embezzled or misappropriated sums of money which had been delivered to him in his capacity of notary."

From the depositions it appeared that there were in all nineteen charges against the prisoner, accusing him of having embezzled or misappropriated certain sums of money, which had been delivered to him in his capacity of notary, by different persons, for purposes of investment or dealing with by way of mortgage or otherwise, all of which moneys he had appropriated to his own use, which was a criminal offence according to the law of England.

The charges were of the following nature :

In one case a person named Brigide was a debtor of a Miss Fouchard to the extent of 3000 francs, which she was pressing him to pay. Brigide thereupon applied to Bellencoutre to raise the money by way of loan. Bellencoutre procured one George to advance the money. Brigide then signed a deed of bond upon which Bellencoutre received the amount, but, instead of paying it over to Miss Fouchard, he converted it to his own use. In another case, a man named Labatard bought, through Bellencoutre, estates at Tilly-sur-Seulles for the sum of 6000 francs, of which 3000 francs were to pay off a mortgage that was on the estate, and the remainder was to complete the purchase. On the 22nd day of July, 1884, Lebatard paid to Bellencoutre the 6000 francs, and received from him a receipt for the amount, but the mortgage was never paid off.

In another case Bellencoutre borrowed from one Dillee 7000 francs on the 17th day of February, 1889, on behalf of a person named Bailleul, to enable Bailleul to pay off estates which he had purchased for 5000 francs, and a debt which he owed to a Mr. Victoire of 2000 francs. Bellencoutre paid over the 5000 francs, but converted to his own use the 2000 francs.

(In these cases there was "no direction in writing" which would bring them within sect. 75 of the Larceny Act of 1861.)

In another case a person named Malassis left with Bellencoutre, on the 7th day of October, 1889, a sum of 6000 francs on "deposit." On the 6th day of June, 1889 he paid him 5000 francs, on the 13th day of June, 1889, he paid him a further sum of 3000 francs. To these sums Bellencoutre was to add 1000 francs interest, which he had received upon a debt due to Malassis, making in all 15,000 francs, and it was agreed to invest this amount by way of loan to one Huc. Bellencoutre converted the whole amount to his own use.

In another case one Lefortier, in January, 1890, paid Bellencoutre 2500 francs for investment, and on the 3rd day of February, 1890, a deed of bond was drawn up, by which a person named Elie acknowledged himself the debtor of Lefortier for that amount; the loan was agreed for five years. In July, 1890, Bellencoutre told Lefortier that Elie had repaid the money, and would

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find him another borrower. On the 2nd day of September, 1890, Lefortier demanded either his title or the money, and Bellencontre gave him a receipt for 2500 francs, stating that a Mr. Bassady, of Paris, was the borrower, and in September Bellencontre paid him interest on the amount.

(In the last two cases there was no direction in writing, but it was contended that they were deposits for safe custody, and would come within sect. 76.)

The remaining cases were similar.

These crimes were provided for and punished by art. 408 of the French penal code which enacts :

Whoever shall have embezzled or misappropriated to the injury of the owners, possessors, or holders any effects, moneys, goods, bills, receipts, or other writings, containing or operating in obligation or discharge, which shall have been delivered to him only by title of hire of deposit under writ, security, loan at interest, or for a work salaried or not salaried, upon the condition to return them or account for them, or to employ them for a special purpose, will be punished with the penalty prescribed in art. 406.

By the Extradition Act, 1870 (33 & 34 Vict. c 52) it is enacted :

Sect. 10. In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime for which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

In the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, prove that the prisoner was convicted of such crime, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

Sect. 26. The term "extradition crime" means a crime which, if committed in England, or within English jurisdiction, would be one of the crimes described in the first schedule to this Act.

The term "fugitive criminal" means any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign State who is in or is suspected of being in some part of Her Majesty's dominions.

The first schedule contains a list of crimes, among which are the following :

Embezzlement and larceny.

Fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company made criminal by any Act for the time being in force.

By the Treaty with France for the mutual extradition of fugitive criminals, one of the crimes for which extradition is to be granted is as follows :

Art. III., No. 18.—*Abus de confiance, ou détournement par un banquier, commissionnaire, administrateur, tuteur, curateur, liquidateur, syndic, officier ministériel, directeur, membre, ou employé d'une société, ou par toute autre personne.*

And by the Larceny Act, 1861 (24 & 25 Vict. c. 96) it is enacted :

Sect. 75. Whosoever, having been intrusted, either solely or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any money, or security for the payment of money, with any *direction in writing* to apply, pay or deliver such money, or security, or any part thereof respectively, or the proceeds or

any part of the proceeds of such security, for any purpose, or to any person specified in such direction, shall, in violation of good faith, and contrary to the terms of such direction, in anywise convert to his own use or benefit, or the use or benefit of any persons other than the person by whom he shall have been so intrusted, such money, security, or proceeds, or any part thereof respectively, &c., shall be guilty of a misdemeanour and liable to be kept in penal servitude for any term not exceeding seven years, and not less than three years.

Sect. 76. Whosoever, being a banker, merchant, broker, attorney, or agent, and being intrusted, either solely or jointly with any other person, with the property (including money) of any other person for safe custody, shall, with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert or appropriate the same, or any part thereof, to or for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, shall be guilty of a misdemeanour and liable to punishment as hereinbefore last mentioned.

On the 6th day of February, 1891, a motion was made for a rule *nisi* for a *habeas corpus*, upon an affidavit of the prisoner, who stated that he was not guilty of the crime of "fraud as an agent," or "fraud by a bailee," and that he had not committed crimes as an agent or bailee within the meaning of the Extradition Acts, as construed by English law; that the warrant of the French tribunal charged him with (a) embezzlement, (b) misappropriating money which had been delivered to him in his capacity of notary; that these were crimes for which punishment was provided by art. 408 of the French Criminal Code, and therefore the crimes for which his extradition was sought; that as to the crime of embezzlement it was not the crime known to the law of England as embezzlement, and as to the crime of misappropriating sums of money delivered to him in his capacity as notary there was no such offence known to the law of England, and that therefore the crimes set out in the warrant of the Juge d'Instruction were not extradition crimes; he further said that the requisition of the Secretary of State and the warrant of Sir John Bridge were invalid, by reason of the fact that the crime or crimes charged therein were not the same as the crime or crimes charged in the warrant issued by the Juge d'Instruction of the French Courts, that the charges were not definitely stated, that the evidence admitted against him disclosed other offences than those for which his surrender was sought, viz., fraud by a bailee, fraud as agent or bailee, embezzlement, misappropriation as a notary, and therefore such evidence was wrongfully received; and as to the sums of money received by him from persons in his capacity as notary, he was informed and believed that those persons had been repaid out of his estate, and that therefore a criminal charge could not be maintained, and extradition ought not to be granted.

The rule *nisi* was granted upon the following grounds:

1. That the French warrant is the warrant which must be regarded as the one containing the crime for which surrender is asked. The crime of embezzlement therein, is not embezzlement according to English law. The crime of misappropriating money as therein charged is not known to the English law. The warrant is void for uncertainty.

2. The English warrants of arrest and committal are bad, for

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differing from the French warrant as also from the requisition of the Secretary of State, and the said warrants are bad as differing one from the other.

3. The warrant for arrest is bad, for uncertainty.

4. The warrant of committal is bad. (a) The prisoner has not committed crimes as a bailee, or an agent within the meaning of the schedules to the Extradition Acts, as construed by the English law. (b) The prisoner will be tried in France for embezzlement; he is not committed therefor. (c) If part is bad the whole is bad.

5. The prisoner will be tried in France for offences committed before surrender.

The *Solicitor-General* (Sir E. Clarke) (*H. Sutton* with him), for the Crown, showed cause.—As regards the grounds put forth on behalf of the prisoner, and upon which the rule *nisi* was obtained, most of them were technical, and the last was quite unintelligible. This, however, was waived; there was only one substantial ground, and that was the fourth. The French warrant is sufficient. *Ex parte Piot* (48 L. T. Rep. N. S. 120; 15 Cox C. C. 208) is a case similar to this. The English warrants also are sufficient. If the warrant of committal for surrender is sufficient, then the warrant of arrest is immaterial. "Fraud by an agent," upon which the prisoner is committed, is a crime within the Act, and within the Treaty, and it is not necessary that the warrant issued by Sir John Bridge should correspond with the warrant of arrest or the requisition of the Secretary of State. The fourth ground, viz., that the warrant of committal is bad, means, no doubt, that there was "no direction in writing," as required by sect. 75 of the Act of 1861. But if there be *prima facie* evidence of any criminal offence within the Treaty, it is sufficient, and there is such evidence in the depositions. Several of the charges show that there was misappropriation by the prisoner of sums of money left with him for safe custody while a transaction was being completed, and that he was therefore guilty under sect. 76. In all the cases money had been received by the prisoner, and stolen, or misappropriated, and why should the court defeat justice by requiring a direction in writing under sect. 75 when it was not required under sect. 76? In several cases large sums of money had been given to the prisoner, either to pay off mortgages or to retain in safe custody until a reinvestment had been determined upon. If in any such case there was anything amounting to a "direction in writing" he committed an offence under sect. 75; if there was not, he was liable under sect. 76. The case is within *Reg. v. Jacobi* (46 L. T. Rep. N. S. 595, in note to *Reg. v. Ganz, Ib.*, p. 592), where it was held that the foreign warrant of arrest was sufficient, and did not require the offence to be set out as to strictly satisfy the English definition of the crime committed abroad. Moreover, in some of the cases the prisoner got possession of the money by means of tricks, and as he appropriated it he was really guilty of

larceny of the money; he stole it. The money was left or deposited with him merely to pay or pass over to other persons; there was therefore no transfer of the property in the money, and supposing the jury found that he never meant to pay the money over they could convict him of stealing the money. At all events all the cases came within sect. 76, and therefore were crimes according to our law. The prisoner would, as to some of the cases, come within sect. 75: (*Reg. v. Tatlock*, 35 L. T. Rep. N. S. 520; 46 L. J. 7, M.C.) [CAVE, J.—There was only a dictum in that case.] At all events the cases come within sect. 76. Four of the cases come within the principle of the decision of *Reg. v. Fullagar* (41 L. T. Rep. N. S. 448; 14 Cox C. C. 370). In one of these 6000 francs had been left on deposit with the prisoner and he appropriated it. [CAVE, J.—But there was afterwards a direction to invest it.] He had already appropriated it, and had it no longer, so that he was liable before the direction to invest. [CAVE, J.—You must find evidence that he had already spent it, and there is no such evidence.] The law surely would not allow him to ride off on that. [CAVE, J.—Surely it would under sect. 76. The offence is appropriating to his own use while it is in safe custody.] It would be in his hands for safe custody until he had invested it. There are other cases similar, as the case of 10,000 francs deposited for investment. [CAVE, J.—There the money was not deposited for safe custody only.] It is submitted that until it was invested it was so intrusted. In *Reg. v. Newman* (46 L. T. Rep. N. S. 394; 8 Q. B. Div. 706) it was held that money intrusted to a solicitor by a client to invest on mortgage on a client's behalf, and which he appropriated to his own use, was not money intrusted for safe custody within sect. 76; but there it was to be invested at once, and some of the judges said, if it were left for the purpose of future investment, it would not be deemed to be left for safe custody. [CAVE, J.—If left for any particular time; but money never can be invested at once on mortgage.] But if there be any interval of time, then during that interval the money is left for safe custody, and the prisoner is liable under sect. 76. However the case may turn out at the trial, it is submitted that there was evidence on which the magistrate could commit. [CAVE, J.—He would have no jurisdiction if the evidence left it uncertain whether there was an offence or not.] It is submitted that there was an offence under one or other of these numerous charges, in all of which the prisoner received the money of others and appropriated it to his own use.

J. P. Grain (Eldridge with him) in support of the rule, argued, first, that the French warrant was the warrant which was to be regarded as the one containing the crime for which the surrender was asked. The case cannot be altered, and there is no power to inquire further: (*Re Terraz*, 39 L. T. Rep. N. S. 502; 48 L. J. 214, Q.B.) Secondly, that the crime of embezzlement mentioned in the French warrant was not embezzlement according to English

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law : (Clarke on Extradition, pp. 148, 219 ; *Ex parte Windsor*, 12 L. T. Rep. N. S. 307 ; 34 L. J. 163, M.C.) There was no evidence of the relation of master and servant : (Stephen's Digest of the Criminal Law, p. 237.) The crime of misappropriating money as charged in the French warrant was not known to the English Law ; the warrant was void for uncertainty. Thirdly, the English warrants of arrest and committal were bad for uncertainty, and also for want of jurisdiction, and for differing one from the other. The warrant of committal was bad : (a) because the magistrate had no power to inquire ; (b) the prisoner was not a bailee (Stephen's Criminal Law, arts. 285 and 300) ; (c) the prisoner did not commit fraud as an agent : (Stephen's Criminal Law, 286, 287 ; *Reg. v. Cooper*, 30 L. T. Rep. N. S. 306 ; 43 L. J. 89, M.C. ; L. Rep. 2 C. C. 123 ; *Reg. v. Tatlock*, 35 L. T. Rep. N. S. 520 ; 46 L. J. 7, M. C. ; *Reg. v. Newman*, 46 L. T. Rep. N. S. 394 ; 8 Q. B. Div. 706 ; *Reg. v. Fullagar*, 41 L. T. Rep. N. S. 448.) The prisoner could not tell what he was to be extradited for ; the French warrant charging him with "having embezzled or misappropriated money which had been delivered to him in his capacity of notary ;" while in the English warrant he was charged with "embezzlement and fraud as an agent or bailee ;" and the requisition of the Secretary of State was for "fraud by a bailee." The offence of embezzlement could not have been committed by the prisoner, as he was not a servant, and the magistrate had no jurisdiction to commit him on that charge. The crime should have been definitely named so that the court could refer to the list of crimes and see if the crime named was one under the law of England. [WILLS, J.—All we have to see is whether he has committed a corresponding crime under the English law. It is perfectly plain, looking to the warrant of committal, that they are proceeding under art. 3, No 18.] Sir John Bridge went beyond his power ; there was no evidence that the prisoner ever was a bailee of any goods or of any sum whatever : (Clarke on Extradition, art. 4, p. xcii. of appendix.) The question of bailment was not a new one ; a man could not be convicted of larceny as a bailee unless the actual thing was retained : (Stephen's Digest, art. 285 ; *Reg. v. Hassall*, 4 L. T. Rep. N. S. 561 ; 30 L. J. 175, M. C.) *Reg. v. Oxenham* (35 L. T. Rep. N. S. 490 ; 46 L. J. 125, M. C.) was the only case to the contrary. The more important point was contained in the second part, where the word "misappropriated" was used. Applying the law of England again, there was no evidence bringing the prisoner within sect. 75 or 76 of the Act of 1861. *Reg. v. Cooper* was absolutely in point and there was no case more analogous. There was no criminal offence under sect. 76, and there was no direction in writing as required by sect. 75. He submitted on the depositions that there was no offence of any kind in any shape or form as known to the English law, and if no offence the prisoner could not be extradited. The committal was bad : (1) as regards fraud as a bailee ; (2) there was no evidence of

any crime; (3) because of the cases of *Reg. v. Newman* and *Reg. v. Cooper*, therefore Sir John Bridge was wrong, and the writ ought to go.

CAVE, J.—A rule *nisi* was obtained for a *habeas corpus* to discharge the prisoner Bellencoutre, on the ground that he had not committed an extradition crime for which he could be delivered over to the French authorities for trial in France. Two points were made on his behalf—the one technical, the other substantial. The technical point referred to the form of the warrants—the French warrant, the warrant of the Secretary of State, and the warrant granted by Sir John Bridge; and it was contended that they, or some of them, were not in proper form. I am of opinion that there is nothing in that ground of objection. The French warrant states, in effect, that the prisoner was in nineteen cases guilty of what the French law terms *abus de confiance*, or fraudulent misappropriation of money deposited with him in his capacity of notary, and it seems to me to state a perfectly good offence within the first schedule to the Extradition Act of 1870; and also under art. 3 of our treaty with France, No. 18 of the list of crimes for which extradition is to be granted. The warrant of the Secretary of State not unnaturally translates the term into the corresponding term in our law, and describes the charge as one of fraud by an agent or bailee. No doubt that is somewhat wider than the charge in the French warrant, which is misappropriation of sums of money by a notary; but I see no objection to it on that ground. All that is necessary is to call the attention of the magistrate to what he is required to do in the case, and it is sufficient if he draws attention to a particular crime under the Act—that is fraud by a bailee, which expresses in a general form what is put more specifically in the French warrant. The warrant by Sir John Bridge seems to me also perfectly good; fraud by a bailee is the term used in No. 18, and it is for the magistrate to inquire whether the evidence laid before him shows a crime abroad that would be a crime in the English courts. To do that he is to consider the law with respect to frauds by bailees, and from the evidence brought before him he came to the conclusion that there was evidence of fraud by a bailee who was an “agent;” and though this evidence might not be sufficient to convict a bailee in an English court, it is sufficient for the purpose of extradition. It appears to me that this is the proper mode of expressing the result of the inquiry, and that there is no ground for saying that there is any defect or immorality in the warrants which would justify us in discharging the prisoner. Now comes the second or substantial point in the case, which is, that the evidence laid before Sir John Bridge ought not to have satisfied him that the prisoner had committed a crime that would be punishable by the English law. When one comes to deal with this point, he is at once struck by the superiority of the French criminal law over our own. In the French code there is an article giving a clear and comprehensive definition of the offence

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which is made punishable. It is *abus de confiance*, or fraudulent misappropriation by any person who has been intrusted with property or money; this is a wide and general definition which embraces a great deal more than is embraced by our criminal law on the same subject. Our law, unfortunately, instead of being in the form of a code, or even of a well-drawn Consolidation Act, is a thing of shreds and patches. One has to look to different portions of the law in order to see to what extent a person intrusted with money or property is made criminally responsible for a fraudulent misappropriation of it. Now we find the law on the subject in different parts of our law. In case of a bailee—in fact of all bailees—he is made responsible where the article with which he has been entrusted is one which he has to return or re-deliver to someone in specie; but he is not responsible where he is at liberty to convert the particular article so delivered to him into something else before the return or delivery is to be made, and that being so the charges against the prisoner do not show an offence of that nature, and that particular provision of our law is out of the case. Then there are two sections (sects. 75 and 76 of the Larceny Act of 1861) which make provision for the punishment of fraudulent bailees of a particular kind. Where a man, if a bailee of a particular kind, as a banker, merchant, broker, or agent, receiving property with specific instructions, such as a direction in writing, how to dispose of it, misappropriates it, then, under sect. 75, he is punishable for it. But then our law requires what the French law does not, a direction in writing. In any of these cases that section does not apply. Then under sect. 76, which is the only other enactment which has any application to the case, a banker, merchant, broker, or agent, who shall receive any property (interpreted in the Act to include money) for safe custody, and shall misappropriate it, shall be guilty of a misdemeanour, and made punishable. This is much narrower than the French code, because it does not apply to all bailees, but only to those described; and it is impossible to say what questions might arise as to what kind of agents are to be included in the enactment. By our law the property must be intrusted to the bailee for safe custody; but if intrusted for any other purpose, then he is no longer within sect. 76. The law of England is far less severe than the law of France, the definition of the crime is much narrower than in the French code. We have therefore to see whether the facts laid before the magistrate justified him in coming to the conclusion that there was a *primâ facie* case made out under this enactment against the English law. Out of the nineteen cases which have been brought before us as made against the prisoner, and which I have gone carefully through, I find that, as regards the 3rd, 4th, 17th, and 18th charges, they are *primâ facie* cases of what would be a crime by English law, and such evidence has been produced respecting these charges as would justify the magistrate in committing the prisoner for trial in an English court.

It appears to me that in these four cases, there is the necessary amount of evidence, and all that is necessary is for the judge to be satisfied that there is sufficient evidence according to English law. That being so, the warrant is good, and consequently the prisoner may rightly be surrendered to be tried on these charges in France, and therefore the warrant for his committal for surrender is good, and the writ of *habeas corpus* ought not to go. Two objections have been made: first, it is objected that the term used in the French warrant is "embezzlement," and it cannot be embezzlement by our law, as appropriation by clerks or servants, is the only species of embezzlement to which our law gives that name, and the prisoner was not a servant. That, however, is not the sense of the term used in the English warrant, which is not a translation of the French warrant (where the word used is *détournement*), and the true meaning is fraudulent misappropriation, against which the objection would not arise. The offence of embezzlement in our ordinary law could only be committed by a clerk or servant, and so the term came to be limited in its signification in that sense; but in this Act that is not so, and embezzlement in the sense of fraudulent misappropriation may be committed by others than clerks and servants, that is by bankers, bailees, or agents; and though only misappropriation by clerks or servants was punishable under that very name or term of "embezzlement," the crime has existed and is made punishable in other cases by the two sections of the Act of 1861, which applies to all bankers, agents, or bailees. A second point taken was, that, as Sir John Bridge had committed the prisoner on all these charges, and the warrant would not be good as to all, therefore it was bad as to all. That is a point I am unable to understand. There is a warrant which describes this as a crime of "fraud by an agent," and the evidence satisfied the magistrate that on these charges it was sufficient, and as to some of them the court considers that he was right. On the others the prisoner can make use of the decision at the trial in France as showing that they are not extradition offences. But I do not see why the warrant which is in general terms is not to be held by us good in respect of those cases as to which we think there is sufficient evidence. For this reason it seems to me that the objections fail, and that therefore the rule must be discharged.

WILLS, J.—I am of the same opinion. As to the technical objections they were not worth consideration, and I shall say nothing more about them. The substance of the case arises on the Extradition Act, which seems to me to require that the person whose extradition is sought shall be guilty in the foreign country of something which is an offence against the English law. If that condition is satisfied, then extradition may be granted if there be sufficient *prima facie* evidence. We cannot expect that the definition or description of a crime when translated should exactly correspond with the definition in our law. It may be impossible to translate terms of the law in one country precisely

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into terms of the law in another country; but it is sufficient if they correspond in substance. I cannot help saying that I share a sort of humiliation, which my learned brother has expressed, in being obliged to confess that a number of fraudulent acts criminal by French law are not punishable at all as crimes by English law. It does seem extraordinary that a man intrusted by others with large sums of money for investment or otherwise should be able to put thousands of pounds in his own pocket in a foreign country fraudulently, and dishonestly, and yet that this should not be a crime according to English law. Fortunately we have sect. 76 of the Larceny Act, 1861, which applies to cases in which bankers, brokers, &c., having been intrusted with property for safe custody, fraudulently misappropriate it. Now there is no doubt at all that Bellescoute answers the description in that section, and there is no doubt that he was intrusted with money within the meaning of that section. I cannot see that this section is one which means property of every description, but I do not for a moment doubt that sect. 76 has a real substantial operation with regard to money. It has been suggested that it applies only to money given to a servant; it is fully within the meaning of the Act if money is intrusted for safe custody. I agree with my learned brother that four out of these nineteen charges come within the terms of that section. It seems to me also that they come within the terms of *Reg. v. Fullagar* cited in the argument, which is absolutely on all-fours with them. There was sufficient evidence in these instances to justify committal. I agree, therefore, that the warrant of committal is good, and that the *habeas corpus* ought not to issue.

Rule discharged.

Solicitor for the prisoner, *S. Myers.*

Solicitor for the Crown, *Solicitor to Treasury.*

QUEEN'S BENCH DIVISION.

Tuesday, April 14, 1891.

(Before SMITH and GRANTHAM, JJ.)

FLETCHER (app.) v. FIELDS (resp.). (a)

Highway—Obstruction—Deposit of goods on pavement or part of street—Prohibition against unloading coal—Unloading coke during prohibited hours—Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134) ss. 6, 15.

(a) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

The Metropolitan Streets Act, 1867, s. 15, provides that, between the hours of ten o'clock in the morning and six o'clock in the evening, no coal shall be loaded or unloaded on or across any footway within the special limits of that Act.

Held, that the above provision does not apply to coke, and that the appellant was therefore wrongly convicted under the section for unloading coke across a footway during the prohibited hours.

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THIS was a case stated by one of the magistrates of the police-courts of the metropolis, sitting as a court of summary jurisdiction at the Westminster Police-court, on the application in writing of the appellant, who was aggrieved by, and desired to question the determination of the said magistrate upon the question of law which arose before him, as hereinafter stated :

1. The appellant was summoned by the respondent, an inspector of Metropolitan Police, for that he, on the 23rd day of October, 1890, in a certain thoroughfare, to wit, Victoria-street, and within the special limits of the Metropolitan Streets Act, 1867, did, between the hours of ten o'clock in the morning, and six in the evening, unlawfully unload a quantity of coke across the footway there, contrary to sect. 15 of the said Metropolitan Streets Act, 1867.

2. On the hearing of the said summons it was proved that the appellant, a carman in the service of the Gas Light and Coke Company, had on the said 23rd day of October, about half past ten in the morning, unloaded a quantity of coke across the footway in Victoria-street, Westminster, and that such footway was within the special limits of the Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134).

3. It was contended for the appellant that coke was not coal within the meaning of sect. 15 of the said Act (30 & 31 Vict. c. 134) and that no offence had been made out against the appellant.

4. It was not disputed that unloading coke is as objectionable as unloading coal, and within the mischief intended to be guarded against by the said Act, and the magistrate held that coke was coal within the meaning of sect. 15 of the said Act, and convicted the appellant of the said offence in the said section.

5. The question for the opinion of the court was whether the appellant could upon the evidence be properly convicted of the offence mentioned in sect. 15, of the said Act (30 & 31 Vict. c. 134).

The Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134) enacts :

Sect. 6. No goods or other articles shall be allowed to rest on any footway or other part of a street, within the general limits of this Act, or be otherwise allowed to cause obstruction or inconvenience to the passage of the public, for a longer time than may be absolutely necessary for loading or unloading such goods or other articles.

Sect. 15. Between the hours of ten o'clock in the morning and six o'clock in the evening no coal shall be loaded or unloaded on or across any footway within the special limits of this Act, and between the same hours and within the same limits no casks, whether empty or full (wine or spirits in cask excepted), shall be lowered or

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drawn up by means of ropes, chains, or other machinery passing across the footway or any part thereof.

Any person doing any act in contravention of this section shall be liable for each offence to a penalty not exceeding forty shillings.

Avory for the appellant.—It is submitted that the magistrate was wrong in this case in convicting the appellant. There is a wide distinction between coal and coke. Coke is only a residual product of coal, in the same way as cinders and tar are, and it could not be contended that a person could be fined under sect. 15 for obstructing a footpath with cinders or barrels of tar. Coke is usually sold by measure, whereas under the Weights and Measures Act, 1889 (52 & 53 Vict. c. 21) coal can only be sold by weight. Other Acts of Parliament also draw a distinction between coke and coal. It would have been very easy for the Legislature to have included coke under this section if it had been thought desirable.

Scrutton, for the respondent, contended that the magistrate was right. Coke is only baked coal. Unloading coke across a footpath would cause just as much obstruction as unloading coal. The object of this provision is to prevent persons obstructing the footpaths to the inconvenience of the public. There is a sufficiently clear distinction between coal and tar to show that the latter does not come within the section, but there is not that distinction between coal and coke.

SMITH, J.—This is a case stated by way of appeal from the decision of one of the metropolitan magistrates. The question which we have to decide is a very small one, and it turns upon the construction which we have to put upon the words used in sect. 15 of the Metropolitan Streets Act, 1867. But before I deal with that section I wish to refer to sect. 6 of the same act, which latter section provides that no goods or other articles shall be allowed to rest on any footway or other part of a street within the general limits of this Act, or be otherwise allowed to cause obstruction or inconvenience to the passage of the public, for a longer time than may be absolutely necessary for loading or unloading such goods or other articles. That section was clearly inserted to prevent obstruction by any description of article. Then by sect. 15 there is a special prohibition as to special articles, for that section enacts that between the hours of ten o'clock in the morning and six o'clock in the evening no coal shall be loaded or unloaded on or across any footway within the special limits of this Act, and between the same hours, and within the same limits no casks, whether empty or full (wine or spirits in cask excepted), shall be lowered or drawn up by means of ropes, chains, or other machinery passing across the footway or any part thereof. Now, it must be remembered that this statute was passed in the year 1867, at which time the products of coal were well known, and I see no reason why we should stretch the word "coal" so as to include coke, or extend the special provision with reference to coal and casks to coke. It has been

suggested that cinders are too far off coal to be included in this provision, and that coke is much nearer to coal. I do not think that we ought to put words into the section that it does not contain, and I am of opinion that the magistrate was wrong in holding that the term coal covered coke, and this conviction must therefore be quashed.

GRANTHAM, J.—I am of the same opinion. This is a statute which undoubtedly deals with the liberty of the subject, and the object of it is to prevent the general public being inconvenienced by the streets being obstructed by private individuals. There is a special provision with reference to obstruction by two specific articles, coal and casks, and if it had been intended to include coke, no doubt that article would also have been mentioned. Coke is a well-known article manufactured from coal, and in my opinion does not come within the term "coal" used in this statute. This conviction must therefore be quashed.

Conviction quashed.

Solicitors: for the appellant, *Bedford, Monier-Williams, and Robinson*; for the respondent, *Wontner and Son*.

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*Highway—
Obstruction—
Deposit of
goods—Pro-
hibition
against un-
loading coal—
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Metropolitan
Streets Act,
1867—80 & 81
Vict. c. 134,
ss. 6, 15.*

CROWN CASES RESERVED.

Saturday, January 24, 1891.

(Before Lord COLERIDGE, C.J., POLLOCK, B., STEPHEN, CHARLES,
and LAWRENCE, JJ.,)

REG. v. VREONES. (a)

*Evidence — Manufacture of false evidence — Attempt to pervert
due course of justice — Judicial tribunal — Arbitrators —
Tampering with arbitration samples.*

*It is not necessary in order to complete the offence of attempting to
pervert the course of justice by the manufacture of false evidence,
that such evidence should be made use of.*

*To tamper with evidence to be laid before arbitrators, appointed by
the parties to a contract for the determination of differences
arising under such contract, is to attempt to pervert the ends of
justice by misleading a tribunal of a judicial nature.*

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

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The prisoner was indicted for having unlawfully, knowingly, and designedly altered the character of the contents of certain sample bags of wheat which had become, and were, evidence to be used before arbitrators appointed in accordance with the terms of a contract to decide any question that might be in dispute between the buyers and sellers of a cargo of wheat, with intent thereby to pass the same off as true and genuine samples of the bulk of such cargo, and thereby to injure and prejudice the buyers of the cargo and to pervert the due course of law and justice. By a contract for the sale of a cargo of wheat, certain stipulations were made for the settling of any disputes that might arise by arbitration, and, for the purposes of being used as evidence in any such arbitration, samples were taken from the bulk by the prisoner on behalf of the seller, and by another person on behalf of the purchaser. Such samples were sealed and taken to the prisoner's house, and while they were in his possession the prisoner tampered with them by extracting the contents of the bags, which he cleaned and replaced in the bags without breaking the seals, thereby producing very much better samples. The samples so altered were forwarded by the prisoner to the London Corn Trade Association, who by the terms of the contract were to appoint arbitrators in default of arbitrators being appointed by the parties should any question be in dispute, and who were also to elect a committee of appeal if necessary for the purpose of hearing and finally deciding any appeal against the award of the arbitrators. No arbitration in fact ever took place.

Held, that the indictment was good and alleged an offence, although it did not allege that an arbitration took place, or that the samples were used as evidence; that the offence committed by the prisoner was not a mere private cheat, but was an attempt to mislead a tribunal of a judicial nature by the manufacture of false evidence; and that it was therefore not necessary that the evidence should have been in fact used in order to constitute the offence charged.

Held also, that, inasmuch as the prisoner had forwarded the samples when altered to the Association in London, and had thereby put it out of his power to retract what he had done, he had done all that he could do to pervert the due course of law and justice, and was therefore rightly convicted upon the evidence of the offence with which he was charged.

THIS was a case stated by Denman, J. for the consideration of this court as follows:

At the last Bristol assizes Anastasios Vreones was tried before me upon an indictment, a copy of which is annexed (a), and found guilty upon each of the four counts of that indictment.

(a) The first count of the indictment, upon which only the judgment of the court was given, was as follows:

City and County of City of Bristol.—1. The jurors for our Lady the Queen upon their oath present that before the commencement of the offence hereinafter mentioned one Sidman Thomas Stephens, on behalf of himself and others trading under the

His wife Blanche Vreones, who was also charged, was acquitted.

The following facts were proved :

On the 11th day of December, 1889, one Stephens, corn merchant at Bristol, entered into a contract with one Sevastopulo

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name, style, and firm of Wait and James at Bristol, had entered into a certain contract with certain persons carrying on business under the name, style, and firm of D. S. Sevastopulo and Co. for the purchase of a cargo of wheat then shipped or about to be shipped on board a vessel called the *Whinfield* from Novorossiisk, in the Black Sea, to the port of Bristol, which said contract then contained a provision that in the event of a dispute arising out of such contract the same should be referred to two arbitrators, whose award should be conclusive and binding upon all disputing parties, and might, upon application of either contracting party be made a rule of any of the divisions of Her Majesty's High Court of Justice in England. And the jurors aforesaid upon their oath aforesaid, do further present that the said ship *Whinfield* duly arrived at the said port of Bristol on the 15th day of March, in the year of our Lord 1890, with the said cargo of wheat, and it then became and was the custom of merchants using the said port to take from the said cargo samples of the wheat as composing the bulk of the said cargo, and for the purpose of using the said samples in the event of a dispute between the buyer and the seller thereof as evidence as to the quality of the bulk of the said cargo in any arbitration which might be taken under the terms of the said contract, to seal such samples with the seals of the buyer and seller of such cargo, and forward the same, so sealed and secured, to the offices of the London Corn Trade Association, in 2, Lime-street-square, in the city of London, and upon any such arbitration as aforesaid the said samples so sealed and secured as aforesaid became and were evidence to be used before the arbitrators appointed to decide the question in dispute between the buyer and seller of such cargo. And the jurors aforesaid upon their oath aforesaid do further present that at the time of the commission of the offence hereinafter mentioned, one Anastasios Vreones was a superintendent appointed by the said D. S. Sevastopulo and Co. to take samples of the said cargo in accordance with the custom in this count before mentioned, and on the 17th day of March, 1890, and on divers other days between that day and the day of the taking of this inquisition, did so take such samples, to which samples the seals of buyer and seller were duly affixed in accordance with the said custom, and the said sealed samples then became and were evidence to be used in accordance with the terms of such contract upon any such arbitration as aforesaid. And the jurors aforesaid upon their oath aforesaid do further present that the said Anastasios Vreones and Blanche Vreones, having in their possession divers, to wit, ninety, bags, each containing samples of the said cargo so taken from the said ship *Whinfield* as aforesaid and duly sealed, afterwards, to wit, on the said 17th day of March, in the year aforesaid, and on divers other days and times between that day and the day of the taking of this inquisition, contriving and intending to deceive the said arbitrators so to be appointed as aforesaid, and wrongfully to make it appear to the said arbitrators, and to cause and induce such arbitrators to believe that the bulk of the said cargo was of better quality than it in fact was, and by fraudulent and deceitful means to cause and induce such arbitrators to give their award in favour of the said D. S. Sevastopulo and Co., and so to pervert the due course of law and justice unlawfully, knowingly, and designedly did take and remove from the said ninety sealed sample bags the contents thereof, unlawfully, knowingly, and designedly did alter the character of such contents and return to such sample bags a quantity of wheat in a different condition, and altered in character and value, with intent thereby to pass the same off as true and genuine samples of the bulk of the said cargo, and, having so altered the character of the said samples, did forward the same to the said London Corn Trade Association in such altered condition with the intent that the same should be used before such arbitrators as aforesaid as such evidence as aforesaid, and thereby to injure and prejudice the said Sidman Thomas Stephens and others, and by the means aforesaid to prevent the due course of law and justice, against the peace of our Lady the Queen, her Crown and dignity.

The second count alleged that before the commencement of the offence therein-after mentioned the said Sidman Thomas Stephens, on behalf of himself and others trading under the name, style, and firm of Wait and James at Bristol, had entered into a certain contract with the said D. S. Sevastopulo and Co. for the purchase of a cargo of wheat then shipped or about to be shipped on board the said ship called the *Whinfield* from Novorossiisk, in the Black Sea, to the port of Bristol,

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for the purchase of a cargo of wheat, to arrive by the s.s. *Whinfield*, consisting in part of Azima wheat about as per sample No. 10, and in part of Azima wheat about as per sample "Rugby," "both samples old crop sealed and in our possession;" about half of the cargo was to consist of each quality. The samples referred to in the contract were called the "standard samples." The wheat No. 10 was in all subsequent transactions spoken of as quality 1, and the "Rugby" as quality 2.

The contract contained the following clause :

Difference in quality shall not entitle the buyer to reject except under the award of arbitrators or the committee of appeal, as the case may be. All disputes arising out of this contract, whether between the parties hereto or between one of them and the trustee in bankruptcy of the other, shall be referred according to the rule indorsed. [Power to either party to make this stipulation a rule of court, neither party nor any one claiming under them to bring any action until dispute settled by arbitration.] And it is expressly agreed that the obtaining an award from either tribunal, as the case may be, shall be a condition precedent to the right of either contracting party to sue the other in respect of any claim arising out of this contract.

which said ship duly arrived at the port of Bristol with the said cargo of wheat on the 15th day of March, 1890, and it then became and was the custom of merchants using the said port to take from the said cargo samples of the wheat so composing the bulk of the same cargo, and, for the purpose of using the same samples in the event of a dispute between buyer and seller thereof as a record of the quality of the said cargo, to seal such samples with the seals of buyer and seller of such cargo, and forward the same so sealed and secured to the offices of the said London Corn Trade Association in London; and that at the time of the commencement of the offence thereafter mentioned the said Anastasios Vreones was a superintendent appointed by the said D. S. Sevastopulo and Co. to take samples of the said cargo in accordance with the custom aforesaid, and on the 17th day of March, 1890, and on divers other days and times between that day and the day of the taking of the inquisition, did so take such samples to which samples the seals of buyer and seller were duly affixed in accordance with the said custom, which said sealed samples then and there became and were tokens denoting the quality of the bulk of such cargo; and that the said Anastasios Vreones and Blanche Vreones having in their possession divers, to wit, ninety bags each containing samples of the said cargo so taken from the said ship *Whinfield* as aforesaid and duly sealed as aforesaid, and so being such tokens as aforesaid, afterwards, to wit, on the said 17th day of March in the year aforesaid, and on divers other days and times between that day and the day of the taking of the inquisition, fraudulently and deceitfully did take and remove from the said ninety sealed bags the contents thereof, and did alter the character of such contents and return to such sample bags a quantity of wheat in a different condition and altered in character and value, and having so altered the character of such contents unlawfully did alter and put off the said false tokens as if the same were true and genuine samples taken in accordance with the custom of the port of Bristol aforesaid, whereby the said Sidman Thomas Stephens and others were unlawfully defrauded and deprived of their just rights and remedies provided by law and by custom for wrongs and for breaches of contract, to which remedies the said Sidman Thomas Stephens and others were according to the due course of law and justice entitled, against the peace, &c.

The third count was the same as the second, except that it charged the prisoner with altering and putting off the said false tokens with intent to defraud and deprive the said Sidman Thomas Stephens and others of their just rights and remedies provided by law and by custom for wrongs and for breaches of contract, to which remedies the said Sidman Thomas Stephens and others were according to the due course of law and justice, entitled, against the peace, &c.

The fourth count alleged upon the same facts as in the first count that upon the arrival of the *Whinfield* at Bristol the said Sidman Thomas Stephens and others were entitled to receive an allowance in respect of the price paid by them and which they had paid in respect of the said cargo, and that by the alteration of the samples by the prisoner (the facts as to which alteration were stated in the same terms as in the first count) the said Sidman Thomas Stephens and others were unable to obtain and did not obtain the said allowance, and were deprived of their rights and remedies in respect of their said contract, against the peace, &c.

Rule 9 indorsed on the contract was as follows :

When buyer requires arbitration on quality or condition upon samples previously drawn and sealed he shall make his claim and nominate his arbitrator within fourteen clear days of the final discharge of the shipment.

Rule 10 was as follows :

10. Arbitration.—All disputes arising out of this contract shall be from time to time referred to two arbitrators, one to be chosen by each party in difference, the two arbitrators having power to call in a third in case they shall deem it necessary. In the event, however, of one of the parties appointing an arbitrator and the other refusing, or for seven days after notice of the appointment neglecting to appoint, or, in case of the death, refusal to act, or incapacity of any one or more of the arbitrators, and the party or parties with whom their or his appointment originally rested shall omit to appoint a substitute within three days after notice of such death, refusal, or incapacity, then upon application of either of the disputing parties, and provided the applicant pays to the secretary of the association the sum of 5*l.* 5*s.*, the questions in dispute shall stand referred to two arbitrators to be appointed by the executive committee of the London Corn Trade Association at a meeting convened by notice, and at which not less than three members shall be present. In case the two arbitrators appointed as aforesaid shall not within fourteen days after their appointment agree to an award or appoint a third arbitrator, then the said executive committee, at a meeting constituted as hereinbefore provided, shall appoint a third arbitrator, and in the case of death, the refusal to act, or incapacity of any such arbitrators, the said executive committee shall, from time to time, substitute a new arbitrator or arbitrators in the place of the arbitrator or arbitrators so dying, refusing, or incapacitated.

The arbitrators appointed shall be in all cases principals engaged in the corn trade as merchants, millers, factors, or brokers, and members of the London Corn Exchange or Baltic. Any person having an interest in the matter in dispute shall be incompetent to act as arbitrator.

The award of any two arbitrators in writing (subject only to the right of appeal hereinafter mentioned) shall be conclusive and binding upon all disputing parties, both with respect to the matter in dispute and all expenses of and incidental to the reference and award.

Any member of the committee having an interest in the matter in dispute shall not vote on the question of the appointment of arbitrators.

In case either party shall be dissatisfied with the award, a right of appeal shall lie to the committee of appeal elected for that purpose, and in accordance with the rules and regulations of the London Corn Trade Association in force at date of contract, provided notice be given to the secretary of that association before four o'clock p.m. on the fourth business day after that on which the objecting party shall have notice of the award, and provided also the appellant (if a member of the association) do pay to the association, on giving notice of appeal as above, the sum of 15*l.* 15*s.* as a fee for the investigation. Or provided also the appellant (if not a member of the association) do pay in like manner and for the like purpose to the association the sum of 21*l.*

The committee of appeal shall confirm the award appealed from, unless four of the members appointed to hear such appeal decide to vary such award.

The award of the committee of appeal, whether confirming the original award or varying such award, shall be signed by the chairman of the committee, whose signature as chairman shall be conclusive, and when signed shall be deemed to be the award of the committee, and shall in all cases be final.

No appeal will be allowed on awards for condition, where the grain is sold on terms known as Rye terms.

Notices under this rule to be given in writing, and delivered personally or left at the usual place of business of the person or firm to whom they are addressed.

The "standard samples" were in this case, as usual, sealed by the seller's broker in presence of the buyer's broker and kept by him, and on that being done the money provided for by the contract was paid. A portion of the wheat from which the sealed standard sample is taken is usually at the same time taken by the buyer and put in a bag by him, to be shown to persons who may be inclined to deal with him. This is called "the bought sample."

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The *Whinfield* arrived on the 15th day of March, 1890, when, in accordance with the usual practice, a superintendent (in this case the defendant A. Vreones) was appointed by the seller, and one Brookman, the buyer's under-foreman, by the buyer, to take samples of the wheat as it came up from the holds. It is unnecessary to describe the mode in which these samples are taken, but they are taken for the purpose of being used as evidence in case any arbitration should take place as to the quality of the cargo, and are called the "arbitration samples."

In the present case ninety of these samples were taken, forty-five of each kind of wheat, and in the ordinary course sealed by the prisoner as superintendent of the seller, and by the under-foreman of the buyer in the usual way, and at the same time the buyer's under-foreman, Brookman, took samples for the buyer's use from the same bulk sample from which the samples in these ninety bags were taken.

The fraud alleged in the indictment consisted in the fraudulent tampering with these arbitration samples after they were sealed by both parties. It was proved at the trial that the whole of these ninety arbitration samples were taken to the house in which the Vreones lodged, before being sent to London to be kept by the London Corn Trade Association in order to be used in evidence in case of a dispute arising which should be referred to arbitration.

It was proved that the prisoner Anastasios Vreones, sometimes when his wife was present, sometimes when alone, sometimes through his wife (whom the jury acquitted as not being aware of any intention to defraud), tampered with these arbitration samples by pulling down a portion of the tops of the bags through the string on the side opposite to the seal—then cleaning the contents from cockles, rye, and small wheat by sifting, picking, and using flannel to which the cockles adhered—and replacing the wheat so cleaned in the bags without breaking the seals, so as to produce a very much better sample than the standard samples, and than any of the other samples taken from the bulk. The motive suggested for this conduct was that in case of any dispute arising as to the quality of the cargo, the purchaser might be defeated by the production of these samples before any arbitrators who might be appointed.

No arbitrators were in fact appointed, nor did the purchaser take any steps in that direction, the reason assigned being that the arbitration samples as altered having been found on comparison superior to the standard sample, and to all the samples fairly taken by either or both parties, it would have been hopeless to proceed to arbitration.

The evidence showed that there was no substantial difference between the cargo and the standard sample so far as the wheat No. 1 was concerned; but as regards the "Rugby" wheat or No. 2, it was proved that there was an inferiority which would amount to 112*l.* in value in that portion of the cargo as compared

with the standard samples. The arbitration samples, as altered, showed wheat of a very superior quality to either the bulk or the standard samples of this portion of the cargo, and also, but not to the same extent, as regards the wheat of quality No. 1.

At the end of the case for the prosecution it was urged by the counsel for Anastasios that the indictment ought to be quashed on the ground that it contained no charge for which an indictment for misdemeanour could be supported.

The objections taken were as follows :

As to the first and fourth counts of the indictment, it was urged that no indictable offence was disclosed because there was no statement of any litigation *in esse*, nor of arbitrators appointed, nor of any arbitration, nor that anyone was in fact actually defrauded, nor that any actual use was made by the prisoner of the arbitration samples, and therefore a *locus penitentiae* existed even if fraud was intended. It was also urged that the evidence did not support either count.

As to the second count, it was urged that the altered samples in the arbitration bags, and the bags themselves, could not be regarded as "false tokens" within the meaning of the authorities. That there was no statement of any facts amounting to an actual defrauding of the prosecutor. That the count stated facts merely amounting to a private cheat, and not to an indictable offence. That it is not an indictable offence to defraud anyone of a legal right or remedy as distinguished from defrauding him of things *in esse*.

As to the third count, it was contended that it amounted at most to an unsuccessful attempt to defraud, and that there was no evidence in support of this or the second count.

Several cases were cited in support of these various contentions, and several passages from text-books, most of which I perused, and as to some of which I think it right that they should be fully considered by the Court of Appeal. I have referred to most, if not all, of these in the margin. (a)

The prisoner called no witnesses, and, after counsel had addressed the jury, I left the case to the jury upon the questions of fact raised by counsel.

The jury acquitted the wife on the ground that she might not have been aware that the acts done by her were done with any fraudulent object, but found the prisoner Anastasios guilty on the ground that they thought all the allegations in the indictment made out and all the counts proved as against Anastasios.

Thereupon I bound the prisoner Anastasios over to come up for judgment when called upon. His counsel moved in arrest of judgment in case that should be necessary. I desire the opinion of the court : First, whether any of the counts of the indictment,

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(a) The cases referred to were the following: *Reg. v. Nicholson* (2 East P. C., chap. 18, pp. 818, 825), *Rex v. Lara* (6 T. R. 565), *Rex v. Wheatley* (2 Burr. 1125; 2 Russ. on Crimes, 4th edit. 617), the passage at the end of Cockburn, C.J.'s judgment in *Reg. v. Closs* (27 L. J. 54, M. C.), and *Rex v. Ward* (2 Strange, 748).

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and, if so, which, contains a statement of an indictable misdemeanour. Secondly, whether the arbitration samples altered and caused to be altered by the prisoner could, according to law, be held to be "false tokens," and, if not, whether the counts in which they are described as false tokens can be held to be made out by the facts independently of that statement. Thirdly, whether, as to all or any of the counts, there was evidence in support of them, or any of them, with reference to the objections above referred to. If the court should be of opinion that all or any of the counts are or is bad, such count or counts to be quashed, or judgment to be arrested thereon. If the court think any of the counts good, and that there was evidence for the jury in support of such counts, the defendant is bound over to come up for judgment when called upon after the decision of this court.

C. M. Mathews, on behalf of the prisoner, submitted that the first count of the indictment was bad, inasmuch as it contained no averment that the evidence which had been falsified, had ever been used, or that any legal proceedings were in existence in which such evidence could have been used, or that any legal or judicial tribunal existed before which the evidence could have been used. The count merely charged the making of false evidence and the forwarding of such evidence to London with intent to deceive arbitrators who might afterwards be appointed, and to pervert the interests of justice and injure the prosecutors. The mere intention to commit a crime was not indictable unless it was accompanied by an act sufficiently proximate to such unlawful intent as to carry it into execution; whereas no act was charged against the prisoner which was sufficiently proximate to the offence to enable it to be carried into effect. An act could not be criminal which in order to be effective depended upon a contingency which never happened. Before any tribunal could be constituted, a number of steps had to be gone through under the contract. [Lord COLERIDGE, C. J.—Was there not a duty on the part of Vreones towards both parties to keep the samples in the state in which they were received for the purpose of transmitting them to London?] It is submitted not; but that the duty was on the parties themselves to put the samples under such control as would keep them safe. At common law an attempt to cheat is no offence—there must be a complete offence; and had the seller himself done what was alleged against the prisoner, it would merely have given rise to a right of action. [CHARLES, J.—You can indict for the attempt to suborn, although you cannot indict for perjury where no perjury has in fact been committed.] But every attempt must, it is submitted, be of such a character as could be successful. The difference between an attempt to suborn and this case is, that there is a case in which a witness may be called. [Lord COLERIDGE, C. J.—Is not a sample a witness, and is it not an offence where a person says he will prefer an indictment and he is

offered a sum of money to swear falsely, although no indictment may ever be preferred before a grand jury?] But here there were many steps before an arbitration could have been held. The submission to arbitration is to be made a rule of court, but not the award, and the indictment was therefore wrong in stating that the award was to be made a rule of court. For the purpose of instituting any legal proceeding here it was necessary that some and perhaps all of the conditions prescribed by conditions 9 and 10 of the contract should be performed. Although the submission might be made a rule of court, the obtaining an award was to be a condition precedent to the suing by either party on this particular contract, and therefore the act of the prisoner was not sufficiently near to the fulfilment of its object. [Lord COLERIDGE, C.J.—Was not the offence complete here when the samples were sent to London; is it material whether they were used or not? According to *Rex v. Crossley* (7 T. R. 315), to which my attention has been drawn, it is not material.] In *Rex v. Crossley* it was held that an indictment for perjury assigned on an affidavit need not state that the affidavit was filed or exhibited to the court, or in any manner used by the party; but there the affidavit was in fact used and exhibited, and all that the court was considering was the time at which the offence of perjury was complete; and, to apply the reasoning of that case to the present, could it be said that there would have been any offence had the prisoner never parted with the samples? [Lord COLERIDGE, C.J.—Here, however, the samples had been sent to London, and nothing that the prisoner could have done could have undone what he had done.] If the averment was sufficient to support a charge of attempting to pervert the course of justice, *Rex v. Heath* (Russ. & Ry. 184) and *Rex v. Stewart* (*Ib.* 288) showed that where no criminal act is in fact done a mere intent to commit such act is not sufficient, and the mere act of delivery of the samples by the prisoner would not be sufficient evidence upon which to convict him under the first count. [Poole, Q.C. pointed out that in *Rex v. Fuller* (Russ. & Ryan) those cases were explained.] With regard to the fourth count, it is submitted, that it contains no averment that the prosecution were unable to obtain the allowance beyond the statement that they were entitled to it under the contract, and that the samples were forwarded to London in such a condition that the prosecutors were unable to obtain it. [Lord COLERIDGE, C.J.—We are against you on the first count; and, that being so, it is unnecessary to go into the other counts.]

Poole, Q.C. and B. Coleridge, for the prosecution, were not called upon.

Lord COLERIDGE, C.J.—This case raises, no doubt, an important question. It is in substance an indictment for attempting by the manufacture of false evidence to mislead a judicial tribunal which might or might not be called into existence. Now, I cannot doubt, if the act of misleading the tribunal had

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been completed, it would have been a misdemeanour—that is to say, that to mislead a court by the manufacture of false evidence is a misdemeanour. The question is, whether the attempt to do so is an offence, although in point of fact the court is not misled, because the piece of evidence which was manufactured is not used—whether such fact makes any difference. I am of opinion that it does not, and that it is none the less a misdemeanour, because the evidence is not used. Now, here all that the prisoner could do to commit the offence he did. There was a contract containing stipulations with regard to the settlement of any dispute which might arise by arbitration. There was a possibility of disputes arising, and a mode of settling those disputes was provided, and a piece of evidence which would undoubtedly be of the greatest possible use was provided by the contract. According to the stipulation, samples were to be taken between buyer and seller, or by both buyer and seller, which were to be put into sealed bags, and such bags when sealed were to be sent up to a tribunal in London. Now, samples were taken in the present case, on behalf of the buyer by his underforeman and on behalf of the seller by the prisoner, which samples were sealed by the underforeman and by the prisoner, who sent them in accordance with the terms of the contract to London. It was admitted that all that the prisoner could do to tamper with the samples and mislead the court in London was done. He sifted the imperfect samples and cleansed them from the cockles, rye, and small wheat which interfered with the perfection of the samples. Having done this to the contents of the bags without breaking their seals, he transmitted to London the bags in order that they might be used in evidence. And the question is, whether, because they were not used in evidence, the offence was any the less complete. I am of opinion that it was complete, and that, whether successful or not, it was in itself a misdemeanour. Though I should have held this, in the absence of authority, upon principle, and on the basis of good sense, I find that it has been so decided. You have in *1 Hawkins, P. C. c. 27, s. 9*, and *Rex v. Crossley* (7 T. R. 315) the principle clearly laid down as to when the attempt to commit the offence of subornation of perjury is committed, and that it is committed although the affidavit which was falsely sworn may not have been used, or the person who swore it may not have been called as a witness, or when called may not have sworn falsely in giving his evidence; and Lawrance, J. in *Rex v. Crossley* pointed out in very emphatic language how monstrous it would be to hold otherwise, and make the guilt or innocence of a person who has, so far as he is concerned, completed the act depend upon the subsequent use of that which such person had completed, it being in the discretion of another person to use it or not. In that case the crime of perjury was completed by the defendant's swearing the affidavit for the purpose of discharging the

rule against him, and could not depend upon the subsequent use of the affidavit, the defendant being equally guilty of perjury though no use had afterwards been made of it. I agree that it is not exactly this case, because upon the swearing of the false affidavit the act of the perjurer is complete; he can do no more. Although here the act is not the same, in principle it is the same, because here the act of the prisoner was complete when he sent the false samples to the London tribunal, which might or might not make use of them. In point of fact they were not made use of; but, as I have said, that makes no difference. I am therefore of opinion that the first count of this indictment is a valid one, and it is not contested that the evidence is sufficient to sustain it; the indictment should therefore be sustained, and the conviction affirmed. It is suggested that there are other questions of importance which arise in the case. All I will say as to them is that it strikes me that the samples here do not fairly come within the words "false tokens;" but I have not heard that question argued, and merely state what is my first impression for what it is worth, the only question which it is material to decide being that which I have endeavoured to deal with.

POLLOCK, B.—I have come to the same conclusion. This is an indictment for a fraud or cheat at common law, and if it had been a case of a private cheat I should have felt myself bound to give effect to the argument that the act of the prisoner was an inchoate act, and that no person had in fact been injured, which conditions are necessary in the case of a private fraud. But this is not a private fraud. It comes, therefore, within the rule laid down in 2 East, P. C. c. 18, s. 4, that "all frauds affecting the Crown and the public at large are indictable, though arising out of a particular transaction or contract with the party." Now one of the precedents he gives is this: "There is the precedent of an indictment against a married woman for pretending to be a widow, and as such executing a bail bond to the sheriff for one arrested on a bailable writ." I am quite clear in my own mind that what I spoke of as a necessary condition precedent—the injury of a private individual—does not arise in this case. The real vice or offence is the doing of some act which has a tendency to prevent the administration of justice. The only question to be considered, therefore, is, whether the handing of those samples to arbitrators, or to the tribunal in London, is to be considered in the same light as if they had been handed to a tribunal for the administration of justice. It is a tribunal to which special sanction is given by the courts where provision is made for it in a contract. The only other question is, whether the act was complete on the part of the prisoner. That has been fully dealt with by my Lord, and I agree with him, and am of opinion that this conviction should be affirmed.

STEPHEN, J.—I am of the same opinion as my Lord, and for the same reasons.

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CHARLES and LAWRENCE, JJ. concurred.

Conviction affirmed.

Solicitor for the prosecution, *Solicitor to the Treasury.*

Solicitor for the prisoner, *W. Webb.*

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CENTRAL CRIMINAL COURT.

February 13 and 19, 1891.

(Before CHARLES, J.)

REG. v. HALL. (a)

Indictment—Breach of statutory duty—Specific remedy provided by statute imposing duty—Preparation of voters' lists by overseers—Non-compliance with Registration Acts—Liability of overseers to indictment at common law—Motion to quash indictment—Reform Act, 1832 (2 & 3 Will. 4, c. 45)—Registration Act, 1843 (6 Vict. c. 18), ss. 13, 51, and 97.

An indictment will not lie against an overseer for wilful breaches of the duties imposed upon him by the Registration Act of 1843, in preparing and publishing voters' lists, inasmuch as for every such breach of duty—the duties being new duties created or re-created by the statute—a special tribunal is created by sect. 51 of the Act, and a penal action given by sect. 97, which excludes the remedy by indictment.

Sects. 13-19 of the Registration Act, 1843, prescribe the duties of overseers in the preparation and publication of the lists of persons entitled to vote in the election of members of Parliament, and these sections contain no general prohibitory clause. Sect. 51 gives the revising barrister power to fine overseers who, in making out such voters' lists, "shall wilfully and without any reasonable cause omit the name of any person duly qualified to be inserted in such list, or who shall wilfully and without reasonable cause insert in such list the name of any person not duly qualified," or who (after specifying all the various offences which may be committed by overseers) shall be wilfully guilty of any other breach of duty in the execution of this Act;" and sect. 97 gives the party aggrieved the right to bring a penal action against the overseer for "every wilful misfeasance, or wilful act of commission or omission contrary to the Act." The

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

Reform Act of 1832 for the first time cast upon the overseer duties in accordance with the register of voters, and sect. 38 of that Act was substantially the same as sect. 13 of the present Act, but that and the other sections of the Act of 1832, relating to such duties, were repealed by the Registration Act of 1843.

Held, by Charles, J., that, upon the true construction of these sections, the duties imposed on overseers with regard to voters by sect. 13 of the Act of 1843 were in fact new duties created or re-created by the statute, and that the specific remedy consisting of the power given to the revising barrister to fine, and of the right of the aggrieved party to bring a penal action, provided by sects. 51 and 97 respectively, for all wilful breaches of the duties imposed by the Act on overseers, excluded the remedy by indictment, and that therefore, for any such wilful breach of duty, an overseer cannot be indicted.

The defendant, being an overseer of the poor, and as such overseer having the duty cast upon him by the Registration Act of 1843 of preparing the voters' lists for the purpose of parliamentary registration, was indicted for having unlawfully and wilfully omitted from such list the name of a person who was qualified as a voter, and for having unlawfully and wilfully inserted in such list the names of persons who were not qualified, and for having attempted to prevent the course of justice by taking steps to place false evidence before the revising barrister in tampering with the list of voters, and in tampering with the register itself. Upon a motion to quash the indictment on the ground that it disclosed no indictable offence.

Held, that the indictment contained no indictable offence, and ought to be quashed; and that the objection that the indictment disclosed no indictable offence could properly be taken by a motion to quash the indictment,

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INDICTMENT for a misdemeanour.

Motion to quash the indictment on the ground that it disclosed no indictable offence.

The defendant, John Hall, was indicted for that he, being an overseer of the parish of St. Mary, Whitechapel, and as such overseer being bound to prepare, for the purpose of parliamentary registration, lists of voters for that parish which is part of a parliamentary borough, did unlawfully, wilfully, maliciously, knowingly, and corruptly omit from such list the name of a person, Stanley Mockett, who was duly qualified as a voter, and also that he did unlawfully, wilfully, maliciously, knowingly, and corruptly insert in the lists of voters the names of a number of persons who were not qualified and who had no right to be on such list, these unqualified persons falling under two classes, namely, a number of aliens who are not entitled to the franchise, being aliens, and secondly, a number of dead persons.

Other counts of the indictment charged him with an alleged

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attempt to prevent the course of justice by placing false evidence before the revising barrister, namely, by tampering with the lists of voters, and by tampering with the register itself.

The defendant having surrendered, and the charge contained in the indictment having been read to him, he did not plead to the indictment.

Asquith, Q.C. (*Arnold White* with him) for the defendant, moved to quash the indictment before the defendant had pleaded, on the ground that it disclosed no indictable offence.

C. M. Mathews (*C. F. Gill* with him) for the prosecution submitted that the proper course would be, not to move to quash the indictment, but to demur to it. That by the practice and upon the authorities when the motion is to quash an indictment, it must be for something patent on the face of the indictment itself, such as the want of jurisdiction, or something of that description, and that only on such ground is a motion to quash an indictment granted. If the objection be that it discloses no indictable offence, the proper course is for the prosecution to join in the demurrer, and for the defendant to plead over. [CHARLES, J.—Yes, that is a course which may be taken; on the other hand, if the indictment discloses no indictable offence, I must hear the motion to quash, if it is desired.]

Asquith, Q.C., on behalf of the defendant, submitted that in moving to quash the indictment he was taking the course that was adopted and followed in the case of *Rea v. Wright* (1 Burr. 543), the point there taken being identically the same as the one here, namely, that no indictment would lie, because the offence was a statutory offence, and because the statute creating it itself prescribed the proper mode of procedure, which was not by indictment. The argument was, that where a statute creates a new offence and gives a particular remedy, no indictment will lie, and after argument Lord Mansfield made the rule absolute.

CHARLES, J.—I think that, with this authority before me, I cannot refuse to entertain the motion to quash.

The sections of the Act which are material to the case are fully set out in the judgment.

Asquith, Q.C. then moved to quash the indictment.

C. Mathews argued on the part of the prosecution.

The nature of the argument sufficiently appears from the judgment.

Asquith, Q.C. replied.

Cur. adv. vult.

Feb. 19.—CHARLES, J.—The defendant stands indicted in no less than seventeen counts of this indictment with crimes which may be classified into three divisions. He is first charged with the wilful omission of various names from the electoral lists. He is secondly charged with the wilful insertion of unqualified persons in the electoral lists, and these charges are made against him as an overseer of the poor, and, it is contended, are breaches of

his duty as overseer, a duty imposed upon him by the Registration Act of 1843 (6 Vict. c. 18). The first fifteen counts of the indictment are concerned with these two classes of charge, but it is needless for me to go through the counts in detail. One and all, they charge wilful and deliberate contravention of his statutory duty. Thirdly, in the 16th and 17th counts he is charged with an illegal attempt to prevent the course of justice by taking steps to place false evidence before the revising barrister, the revising barrister being in a certain sense a judicial tribunal. The two counts vary in form; in the 16th he is charged with tampering with the list of voters, and in the 17th he is charged with tampering with the register itself; the register itself, when published, being evidence of the right to vote of the persons whose names are contained in it. Upon the defendant being indicted on the 13th day of February, a motion was made on his behalf to quash the whole indictment, on the ground that no indictable offence was disclosed by it, that no indictment would lie against him, because the offence charged against him was a statutory offence, with a particular remedy prescribed by the statute, which imposed upon him the duty for the breach of which he was charged, and after hearing a very able argument on both sides, on the part of the prosecution by Mr. Mathews, and Mr. Asquith on the part of the defendant, I took time to consider my decision on the case. Now, before I refer to the statutes, which I must do in some detail, it is desirable that I should state the principle which governs a case of this description, and it is to be found stated nowhere better, I think, than in Hawkins' Pleas of the Crown, book 2, c. 25, sect. 4. The law is there stated in the following terms: "It seems to be a good general ground that wherever a statute prohibits a matter of public grievance to the liberties and security of a subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable not only at the suit of the party aggrieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it. Yet, if the party offending have been fined to the King, in an action brought by the party, as it is said that he may, in every action for doing a thing prohibited by statute, it seems questionable whether he may be afterwards indicted, because that would be to make him liable to a second fine for the same offence. Also, where a statute makes a new offence, which was no way prohibited by the common law, and appoints a peculiar manner of proceeding against the offender as by commitment, or action of debt, or information, &c., without mentioning an indictment, it seems to be settled at this day that it would not maintain an indictment, because the mention of other methods of proceeding seems impliedly to exclude that of indictment; yet it hath been adjudged that, if such a statute give a recovery by action of debt, bill, plaint, or information, or otherwise, it authorises a

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proceeding by way of indictment. Also, where a statute adds a further penalty to an offence prohibited by the common law, there can be no doubt but that the offender may still be indicted, if the prosecutor think fit, at the common law; and if the indictment for such offence conclude *contra formam statuti*, and cannot be made good as an indictment upon the statute, it seems to be now settled that it may be maintained as an indictment at common law, as will be more fully shown in the following part of this chapter." That is a full statement of the principle which must guide me in the decision of this case. And the inquiry therefore to which I have to address myself is this: first, whether the offence with which the defendant is charged is a statutable offence simply; and, secondly, if it be so, whether the statute creating the offence has prescribed a particular remedy in such terms as to include either expressly or by implication the remedy by indictment. Upon the first point I do not think there can be any room for doubt or controversy. All the offences charged against the defendant are wilful violations of duties imposed upon overseers of the poor, not by the common law, but by the Registration Act of 1843 and the amending statutes, and they consist entirely of alleged breaches of duties created by those statutes, and not otherwise, and, in particular, of duties created by the 13th and following sections of the Registration Act of 1843. With reference to these duties, sect. 51 provides "that an overseer who shall wilfully refuse or neglect to make out any list, or who shall wilfully neglect to insert therein the name of any person who shall have given due notice of claim, or who, in making out the list of voters for any city or borough, shall wilfully and without any reasonable cause omit the name of any person duly qualified to be inserted in such list, or who shall wilfully and without reasonable cause insert in such list the name of any person not duly qualified . . . whoever shall wilfully be guilty of any other breach of duty in the execution of this statute shall for every such offence be liable to a penalty by way of fine of a sum of money not exceeding 5*l.*, nor less than 20*s.*, to be imposed by and at the discretion of any barrister holding any court for the revision of any list of the parish or township of such overseer: Provided always, that nothing herein contained as to any fine as aforesaid shall affect or abridge any right of action against any overseer or other person liable to any fine as aforesaid, or any liability such overseer or other party may incur under or by virtue of this Act or the said recited Act." That is the section which deals with offences against this statute, and it may be observed that the penalty prescribed by this section is not imposed for any other breach of his duty which has been laid upon the overseer in the earlier part of the Act, but on every breach, for, after enumerating a number of specific breaches of duty, the section contains the words "or who shall be guilty, wilfully guilty" of any other breach of duty in the execution of this Act. Having read that section, which creates the offence of the wilful

neglect of duty, it is necessary that I should recur to the earlier part of the statute, which imposes the various duties in connection with the electoral lists upon the overseer. But before I do so, and in order to appreciate some arguments that were addressed to me on the part of the prosecution, I may shortly refer to the position of an overseer under the Reform Act of 1832. The 2 Will. 4, c. 45, for the first time cast upon the overseer generally duties in connection with the register of voters. By that Act of Parliament provision was made for the preparation of a general register of electors, both in towns and counties, and the duty of preparing that register was laid upon the overseers; they had to prepare the lists, they had to publish the lists, they had to prepare and put upon the lists the names of the persons who were objected to, and to forward all the lists to the clerk of the peace in the case of the county, and to the town clerk in the case of a borough, and those officials had afterwards to forward them to the revising barrister, whose appointment was provided for by the same statute, to revise the list. The sections which particularise their various duties are sects. 37 to 57. Those sections were repealed by the Registration Act of 1843, which, after reciting the Reform Act of 1832, enacted that the said clauses and provisions of the said Act for the purpose of forming a register, &c., should be, and are repealed. And then by sect. 2, "This Act is to be taken to be part of the said Reform Act of 2 Will. 4, c. 45, as fully as if it were incorporated therewith." There is, however, a section in the Reform Act of 1832 which was not repealed; and, although I am not quite clear as to the effect which subsequent legislation has had upon these sections, it is sufficient for my present purpose to state that the 76th section of the Reform Act of 1832 is not repealed, and that provides "that if any sheriff, returning officer, barrister, or overseer, or any person whatsoever shall wilfully contravene or disobey the provisions of this Act or any of them, with respect to any matter or thing which such sheriff, returning officer, barrister, or overseer, or other person is hereby required to do, he shall for such his offence be liable to be sued in an action of debt in any of His Majesty's Courts of Record at Westminster for the penal sum of 500*l.*, and the jury before whom such action shall be tried may find their verdict for the full sum of 500*l.*, or for any less sum which the said jury shall think it just that he should pay for such his offence, and the defendant in such action being convicted shall pay such penal sum so awarded, with full costs of suit, to the party who may sue for the same: Provided always, that no such action shall be brought except by a person being an elector, or claiming to be an elector, a candidate, or a member actually returned, or other party aggrieved: Provided also, that the remedy hereby given against the returning officer shall not be construed to supersede any remedy or action against him, according to the law now in force." My attention was

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specially directed by Mr. Mathews, on the part of the prosecution, to what the position of overseers of the poor was in the nine years that elapsed between 1832 and 1843. He said that the Reform Act laid duties upon them, and that for the breach of those duties the overseers were undoubtedly indictable. Now, if there had been no 76th section in the statute of Will. 4, that position would have been a sound one, for it would have fallen within the general principle to which I have alluded, that where a duty is created by statute, and no remedy is prescribed but by indictment, a person guilty of a breach of the duty so imposed is indictable. But there is this 76th section, which appears to me to be an express and particular remedy given to anybody, an elector, or a candidate, or a member, or any other party aggrieved, an express provision that he may bring an action against any overseer who is guilty of wilful breach of duty, and a jury may award any sum they think fit up to the sum of 500*l*. And if I had to decide that point I should feel no doubt that the principle to which I have referred did govern the position of overseers of the poor for the nine years in question, and that during that period of nine years any overseer of the poor who had been guilty of any breach of duty would be liable to conviction under the 76th section, and there being a specific and particular remedy imposed by the same Act of Parliament that imposed the duty, it excludes the notion that overseers during those nine years were indictable. It is a matter, as was pointed out to me by Mr. Asquith, of construction—of construction of the statute. And I cannot read the 76th section of the statute, especially having regard to the proviso which reserves remedies against the returning officer, without coming clearly to the conclusion that during those nine years the overseers of the poor would not have been indictable. But supposing I am wrong in that, and supposing that the duties imposed by the earlier part of the Reform Act of 1832 did form the subject-matter of indictment, then this ingenious argument was presented to me: It was said that, if that is so, the Registration Act of 1843 imposed no new duty, created no new duty in the overseers, it simply prolonged the duty which they had to perform under the Reform Act of 1832, and, therefore, inasmuch as the duty was imposed by the Registration Act of 1843, in unqualified terms, and the penal section which I have just read in full is in a later part of the statute, that the principle applies that the overseer is indictable for the breach of the duty imposed by the earlier part of the statute, because it is not a new duty; it was a duty which was already cast upon overseers; and the case would then be similar to the case referred to by Hawkins of a man being guilty of an offence apart from the statute upon which he is indicted, in which case the special remedy provided by the statute under which he is indicted, is a cumulative or an alternative remedy. But I cannot accede to that argument, for this reason, that the 1st section of the Registration Act of 1843

repeals all the registration sections of the Act of 1832, and therefore the duty created by the 13th section of the Act of 1843 was, in point of fact, a new duty and a duty created by that statute. It is true it was re-created, it may be; but still it was a fresh statutory creation. Therefore, in approaching the consideration of the Registration Act of 1843, I approach it in this aspect: those duties imposed by the section of the Registration Act of 1843 are, in fact, freshly created duties, for the reasons I have given. I do not think it really makes a very material difference, because, as I have said in my judgment, an overseer even under the Act of 1832 would not have been indictable. But, even assuming he would have been indictable, inasmuch as the sections relating to his duties were all repealed by the 1st section of the Act of 1843, I still approach the case upon this footing: that the duties, with the wilful disregard of which the defendant is charged, are imposed on him by the Act of 1843, and, in point of law, for the first time, because the statute which had imposed similar duties (not altogether the same, but similar duties) on the overseer of the poor, was itself repealed by the later Act of Parliament. Now, then, I have to consider the case regarding the defendant as in the position of having duties imposed on him, in point of law, for the first time by the Act of 1843. Those duties commence really with the 13th section of the statute. They are prescribed by the 13th and following sections of the statute, and principally by the 13th section, as amended by the later Registration Acts. By the 10th section the town clerk is instructed to have a form of precept issued to the overseer, and that precept is now (by later legislation, to which I need not refer, by the effect of the Local Government Act of 1888, and a Registration Order issued thereunder in 1889) to be in the form prescribed by that Registration Order; and it gives the overseers what they certainly require, however intelligent they may be, minute instructions as to what they are to do with reference to the preparation of the lists. The 13th section provides as follows: "The overseers of every such parish or township shall, on or before the last day of July in every year, make out, or cause to be made out, according to the form numbered 3 in schedule B. to this Act annexed, an alphabetical list of all persons who may be entitled to vote in the election of a member or members to serve in Parliament for such city or borough, in respect of the occupation of premises of the clear yearly value of not less than 10*l.*, situate wholly or in part within such parish or township; and another alphabetical list, according to the form numbered 4 in the said schedule B., of all other persons (except freemen) who may be entitled to vote in the election of such city or borough by virtue of any other right whatsoever; and in each of the said lists the Christian name and surname of every such person shall be written at full length, together with the place of his abode and the nature of his qualification; and where any person shall be entitled to vote in respect of any property, then the name of the

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street, lane, and the number of the house (if any), or other description of the place where such property may be situate, shall be specified in the list; and the said overseers shall sign such lists, and shall forthwith cause a sufficient number of copies of each of the said lists to be written or printed, and shall publish copies of the said lists on or before the 1st day of August in each year, and shall likewise keep a copy of each of the said lists, to be perused by any person, without payment of any fee, at any time between the hours of ten of the clock in the forenoon and four of the clock in the afternoon of any day, except Sunday, during the first fourteen days after such lists shall have been so published, and shall deliver copies thereof to all persons applying for the same on payment of a price for each copy." The 15th section provides that persons omitted from borough lists may give notice of claim, and that the overseers are to make out lists of the claimants; and that persons named in the lists may be objected to by any other persons as not being entitled to be put on the lists. The overseers, by the 18th section, are to make out lists of persons objected to, and they are to publish the lists of persons objected to, and the lists of claimants; and by the 19th section they are to deliver the lists of voters, and the lists of claimants, and the lists of persons objected to to the town clerk. The dates at which they are to do these various duties have all been altered, but the duties substantially remain the same. I need not (it would be wasting time to do so) read at length the Registration Order of 1889, which instructs the overseers what to do. They are instructed to prepare lists of voters, lists of claimants, and lists of persons objected to, and—and this is very material with regard to the last two counts of the indictment—not to deliver them to the revising barrister, but to publish them, and after they have published them, and they have been published a specified time, to deliver the lists to the town clerk. Those are the duties, then, which the overseers have to perform, duties created, or rather re-created by the statute itself. The Registration Act of 1878 (41 & 42 Vict. c. 26), which made many alterations in the mode in which those lists should be prepared, provides by the 29th section that "the provisions of the 51st section of the Parliamentary Registration Act of 1843, relating to the power of the revising barrister to fine overseers for neglect of duty, shall extend to every wilful refusal, neglect, or breach of duty on the part of overseers in the execution of this Act." So that the matter stands thus: By the Act duties are imposed in the sections numbered from 13 to 19; in the 51st section offences are created, namely, a wilful breach of any of those duties so imposed; and for those offences so described a specific penalty is enacted. But the matter does not rest there, for under the 97th section of the same statute it is provided that "every sheriff, under-sheriff, clerk of the peace, town clerk, secondary, returning officer, clerk of the Crown, postmaster, overseer, or other person, or public officer

required by this Act to do any matter or thing, shall for every wilful misfeasance, or wilful act of commission, or omission contrary to this Act, forfeit to any party aggrieved the penal sum of 100*l.*, or such less sum as the jury before whom may be tried any action to be brought for the recovery of the before-mentioned sum shall consider just to be paid to such party, to be recovered by such party with full costs of suit by action for debt in any of Her Majesty's Superior Courts at Westminster; provided always, that nothing herein contained shall be construed to supersede any remedy or action against any returning officer according to any law now in force." Now, what is the true construction to be placed upon those sections, the sections which impose the duty, the sections which impose the penalty, for wilful neglect of that duty, by way of fine to the revising barrister, and the section giving power, in case of any wilful act of commission or omission by an overseer, to any party to bring an action against the overseer? I have come to the conclusion, after carefully considering all these sections, that this is a case where the specific remedy provided by sects. 51 and 97 excludes the remedy (which would otherwise undoubtedly exist) by indictment. And I am led to that conclusion by several considerations. First, I notice that a special tribunal is provided by the 51st section to punish what? not isolated breaches of duty, not non-attendance before the revising barrister, or non-deliverance of lists to the town clerk, but to punish all wilful breaches of duty by an overseer. And that tribunal is invested with discretion to fine an overseer of the poor a sum not exceeding 5*l.*, and not less than 20*s.* It would seem a very strange construction of this statute, after having created a special tribunal, to fine an overseer a sum not exceeding 5*l.* for any breach of duty under that statute, to hold that an overseer of the poor was nevertheless liable to any amount of fine that might be judicially imposed on him, or to any amount of imprisonment that also might be imposed on him for his offence. I own I approach the consideration of these statutes with, I will not say a desire, but with a feeling that upon public grounds it might be desirable that a remedy by indictment should be had, for the overseers of the poor are invested, undoubtedly, with authority by this Act of Parliament which is capable of gross misuse. It is worth notice that from 1843 to 1891, so far as the researches of counsel have gone, no instance exists of an overseer ever having been indicted under this Act of Parliament. That is worth notice. It may be desirable that such a remedy should exist; it may be desirable on public grounds; but, on the other hand, I cannot but remember how minute and multifarious are those duties which are imposed on overseers, who are persons no doubt usually competent or tolerably competent to perform them; but they are minute and multifarious duties, and I think it is clear that the intention of the Legislature was that he who would have the very best opportunity of seeing whether the overseers had discharged their minute and

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multifarious duties should be the sole person to say whether they had been guilty of any breach of them or not, and whether they had incurred any, and, if so, what fine. The creation of a special tribunal is a most important matter in my mind, as showing that upon a true construction of the statute it was intended that it should be the exclusive tribunal to dispose of such matters. Mr. Mathews said that it was a very undesirable tribunal, because the revising barrister is a creature of the hour, and when he has signed the lists and delivered up his appointment to the Treasury as a judicial officer his duties are at an end. That is true; but, on the other hand, he is the person of all others who is the best qualified to judge whether a wilful breach of duty has been committed by the overseer or not. And it is hardly credible, as Mr. Mathews suggested, that a breach of duty might be found out after the revising barrister had ceased to exist. If that were to happen, what, he asked, could be done then? There are two answers, it seems to me, to that argument: first, that it is hardly possible, if a breach of duty were committed, that it would not be discovered until after the revising barrister had ceased to exist, because these are not secret documents; they are published to everybody; published on every church and chapel in the borough; and if there were any case of deliberate omission or insertion, one would suppose that it must almost certainly be discovered by somebody before the revising barrister holds his court. But if it were not discovered, there remains the penal section, sect. 97, which, to my mind, points strongly again against any remedy by indictment, because it prescribes that the party aggrieved may bring an action to recover 100*l.* against the defaulting overseer, and contains a proviso similar to the proviso in the 76th section of the statute of Will. 4: "Provided also, that nothing herein contained shall be construed to supersede any remedy or action against any returning officer according to any law now in force." The 51st section, which I read at length at the commencement of my observations, has also a proviso, on which some reliance was placed by Mr. Mathews, and it was also relied on by Mr. Asquith. That proviso is to this effect: "That nothing herein contained as to any fine as aforesaid shall affect or abridge any right of action against any overseer or other person liable to any fine as aforesaid, or any liability such overseer or other person may incur under or by virtue of this Act, or the said recited Act." Now, it was pointed out to me, on the part of the defendant, that the proviso in sect. 97, reserving remedies against the returning officer, was a very significant proviso, and that it appeared to indicate almost decisively that the only remedy against an overseer was that prescribed by the earlier part of the section. And I think there was great force in that argument. Further, it was pointed out to me that no remedy by indictment is reserved by sect. 51, but that the proviso appears to refer to the rights of action and nothing else. Mr.

Mathews, in answer, said that the word "liability" was there, as well as the word "action." But that seems to me to refer to something other than an indictment, and, having regard to the fact that the 76th section of the "said recited Act" is unrepealed, I think the word is amply satisfied by holding that it refers to the criminal liability expressly imposed by that section. On these grounds, on the ground that a special tribunal is created, and on the ground that a penal action is given in the language of the proviso to sect. 97, it seems to me that those are the only remedies that can be enforced against an overseer, and that this is one of those cases in which a parliamentary duty is imposed on an overseer, but that the method of proceeding by indictment is manifestly excluded by the statute itself. It remains to consider whether there is anything in any of the authorities that have been cited before me to militate against that conclusion. Far from finding, upon a careful consideration of them, anything adverse to the conclusions at which I have arrived, it seems to me that when fairly read they support it. The earliest in date of the authorities relied on by Mr. Mathews was a case in Sayer's Reports (*Res v. Davis*), decided in 1754, and reported in Sayer at page 163, which decided that an indictment will lie against an overseer for not receiving a pauper removed by the order of two justices of the peace; and the Chief Justice said, in giving his judgment, this: "It has been said that as the offence of an overseer of the poor in not receiving a pauper removed by an order of two justices of the peace, is a new offence created by the 3 & 4 Will. & Mary, c. 11, an indictment will not lie, another remedy being given by that statute, namely, that if any overseer of the poor shall refuse to receive a person removed by warrant of two justices of the peace from one county, city, or town corporate to another, he shall forfeit the sum of 5*l*. . . . We are of opinion that as a power of removing a person likely to become chargeable to a parish is given to two justices of the peace by the 13 & 14 Car. 2, c. 12, the not receiving of a person removed by an order of two justices of the peace is an offence against that statute, and consequently an indictment will lie." Now, Mr. Mathews relied on that as showing that an indictment would lie against the overseer, in spite of those specific remedies provided against him; but it is observable that the court was of opinion that an offence had been committed against an earlier unrepealed statute, and I, therefore, cannot apply the first sentence of this judgment to the present case, because, as I have pointed out, assuming an overseer to be liable to be indicted for a breach of duty under the Reform Act, the Reform Act was itself repealed by the Registration Act of 1843. But the judgment goes on: "If this were a new offence created by the 3 & 4 Will. & Mary, c. 11, yet an indictment will in our opinion lie, in case the removal was to a place within the jurisdiction of the justices by whom the order of removal was made, the remedy by the latter statute being only given where the removal was to a

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place out of their jurisdiction. It does not appear from the indictment in the present case that the removal was to a place out of the jurisdiction of the justices by whom the order was made, and if intendment was necessary, the courts would, in support of the verdict, intend that it was to a place within their jurisdiction." It appears to me to be quite obvious that the learned judges who decided that case were of opinion that, if the specific remedy provided by the statute of William and Mary had been applicable at all, that their decision would have been that the indictment was not maintainable, because they held that the indictment was only maintainable, assuming the offence is a new one, because the specific remedy had no application to the facts proved against the defendant in that case. The case would be analogous to the present case, and might be well relied on by the prosecution, if the 51st section of this Registration Act had only applied to this and that particular breach of duty, and if the defendant stood charged with a breach of duty other than the duty mentioned in sect. 51. But, as I have pointed out already, sect. 51 applies to every possible breach of duty by an overseer. So that it seems to me that, instead of the case of *Rex v. Davis* (*ubi sup.*) supporting the contention of the prosecution, it supports the conclusion at which I have arrived. The next case cited to me was that of *Rex v. Wright* (1 Burr. 543), which decided, not for the first time, but decided in accordance with the general principles which had been laid down long before, that an indictment will not lie upon an Act of Parliament which creates a new offence and prescribes a particular remedy. And Lord Mansfield, in giving judgment, said: "I always took it that where new created offences are only prohibited by the general prohibitory clause of an Act of Parliament, an indictment will lie, but where there is a prohibitory particular clause, specifying only particular remedies, that such particular remedy must be pursued. For otherwise the defendant would be liable to a double prosecution, one upon the general prohibition, and the other upon the particular specific remedy." Now that language almost exactly covers this case. There is, however, in this statute no express general prohibition, and, dealing with it as a matter of construction, I find it impossible to hold that because the 51st section does not immediately in number succeed the clause imposing the duty, I must therefore imply a general prohibitory clause in the 13th section itself. If there were no 51st section in the Act, there might be some ground for saying that by implication it ought to be implied on the general principle that where no other remedy is provided an indictment will lie. But certainly in the 13th clause there is no general prohibition, and the only prohibition which exists in the statute is the particular one mentioned in sect. 51. The language, therefore, of Denison, J., in the case cited, is inapplicable. "Where," he says, "an offence is not so at common law, but made an offence

by Act of Parliament, yet an indictment will lie where there is a substantive prohibitory clause in such Act of Parliament (although there be afterwards a particular provision and a particular remedy given), but it is otherwise where the Act is not prohibitory, but only inflicts the forfeiture and specifies the remedy." And the other judge gave judgment to the same effect; Wilmut, J. also took it so. It seems to me clear that this case cannot be relied on by the prosecution, for the reason given by Lord Mansfield, and because on the construction of the statute I cannot see any substantive prohibitory clause at all, the only prohibitory clauses are the sections 51 and 97. Then the next case relied on is that of *Rex v. Robinson* (2 Burr. p. 800), in which it was held that an indictment lies for disobeying an order of sessions. And Lord Mansfield there says this: "The objection to this indictment is that the offence is not indictable, because the Act of Parliament has pointed out a particular punishment, and a specific method of recovering the penalty which it inflicts. The rule is certain 'that where a statute creates a new offence, by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offence (not antecedently unlawful)'—that is, not antecedently to the statute unlawful—'by a particular sanction and particular method of proceeding, that particular method of proceeding must be pursued and no other. And this is the resolution in *Castle's case* (Cro. Jac. 643). But where the offence was antecedently punishable by a common law proceeding, and a statute provides a particular remedy by a summary proceeding, there either method may be pursued, and the prosecutor is at liberty either to proceed at common law, or in the method prescribed by the statute, because there the sanction is cumulative, and does not exclude the common law punishment." Now, I am bound by that statement of the law of course, and it is entirely consistent with the view I take of the present case. In order to apply it to the present case, the prosecution would have to satisfy me that, apart from the Registration Act of 1843, the offence which they are now seeking to punish was antecedently punishable by common law proceeding. Therefore the dictum of Lord Mansfield in that case is not applicable to the present case. In the same volume of Burrows another case is referred to, the case of *Rex v. Boyall* (2 Burr. 832), where it was held that "an indictment lies (the head-note stating 'indictment does not lie' is incorrect) for not performing statutory labour on the highway." Lord Mansfield says there: "As to the third objection, it was an offence indictable before the appointment of the summary remedy prescribed by the statute of 22 Charles 2. The case of *Rex v. Davis* was of the same kind. Therefore the summary jurisdiction is cumulative (although there is another remedy given), and does not exclude the common law remedy." All that this case decided is that, where there is a common law remedy by indictment prior to the statute which gives the new remedy,

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there the new remedy is cumulative on the old one, or alternative with the old one, and that either course may be pursued. So far as I have gone, it seems, therefore, that the case in Sayer's Reports affords strong support to the view I take of the present case, and that there is nothing in Burrows which controverts the correctness of my conclusion. Now I come to another case, one on which much reliance is placed. It is the case of *Rex v. Harris*, in 4 Term Reports, at page 202, and that case certainly requires careful examination. It was an indictment against a pilot for disobeying an Order in Council which had forbidden access to a certain ship called the *Stephen* while she was performing quarantine; and the Order in Council was set forth in the indictment. Lord Kenyon, in giving judgment, says: "This indictment states that the King in Council made an order in pursuance of this Act, which the defendant violated; and, therefore, without adverting to the other clauses in this Act of Parliament, which are adapted to other offences, the question is, whether or not the disobedience of an order thus made by the King in Council be not an offence at common law? And most unquestionably it is." That, again, is in exact accordance with the principle I read at the commencement of my judgment. It was a case in which a man was indicted for disobeying an Act of Parliament, the Act of Parliament having prescribed no other remedy against him. There was indeed another section imposing a penalty in the Act, but that section applied to offences against the Act committed by the commander of the ship and persons who belonged to the crew, and did not include the defendant in the case, who was a pilot; and Lord Kenyon obviously places his judgment on this ground: without adverting to the other clauses in this Act of Parliament, which are adapted to other offences he says, "The question is whether or not the disobedience of an order thus made by the King in Council be not an offence at common law?" It was suggested, however, that this really was a case where, in one section, there had been a general enactment that a certain quarantine Order in Council must be obeyed, and in another section a particular remedy attached to disobedience of that order, and yet an indictment lay, but on examination of the case nothing of the kind appears. It is plain, from the judgment of Lord Kenyon, that he was of opinion that the language of the latter section of the Act of Parliament did not apply to the pilot at all. So, again, Ashurst, J. says: "It is a clear and established principle that, when a new offence is created by an Act of Parliament, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty, but he may proceed on the prior clause on the ground of its being a misdemeanour. Now here the defendant has been guilty of a breach of the 1st section of this Act of Parliament, which expressly gave power to the King in Council to make orders relative to persons going on board ships liable to perform quarantine, for the indictment states that the King in Council

made an order on this subject, which it was competent to him to make, and that the defendant disobeyed it. For this he is clearly punishable as for a misdemeanour at common law. This renders it unnecessary to make any determination on the 5th section of the Act; but, if it were necessary to consider it, I should think that it relates only to the officers and passengers who came on board the ship from the infected place, and not to persons going on board after her arrival here." Buller, J. agrees with Ashurst J. that the defendant was not within the meaning of the 5th section. That case, therefore, decided nothing new, but only reiterated the old principle that where an Act of Parliament creates an offence and prescribes no remedy for it, the offence is indictable at common law, and the language of Ashurst, J. with regard to the creation of the offence by the Act of Parliament, and annexing a penalty by a separate and substantive clause, is not necessary for that decision. But I may say that I do not dissent in any way from the observation of the learned judge. The difficulty Mr. Mathews has to meet is, that here there is no new offence expressly created by one clause, and a penalty annexed to it by another; and I cannot, where an express remedy is provided, imply a general substantive prohibition in the clause of the statute creating, not a new offence, but a new duty. I was invited to do so by the consideration of two cases, the case of *Rex v. Jones*, which is in *Strange's Reports*, p. 1145, and the case of *Reg. v. Price* (11 A. & E. 727). But the case of *Rex v. Jones* really has no bearing on the present discussion. There it was held that an overseer of the poor was indictable because he would not take office, and the astonishing argument was presented to the court, that because the statute of Elizabeth imposed a penalty upon an overseer after he had taken office, therefore he could not be indicted because he had not taken the office. It is only necessary to state that argument to ensure its refutation. The indictment said that he had obstinately refused to take the office on him, and disobeyed the Act of Parliament, and so should be punished upon the principles of the common law. With regard to the case of *Reg. v. Price* (*ubi sup.*), that is simply, when it is carefully looked at, an illustration of the well-known principle that a man who disobeys an Act of Parliament which prescribes no other remedy, is liable to indictment for misdemeanour. In that case the defendant had failed to register the birth of his child. The Act of 6 & 7 Will. 4, c. 86, provides that the father of a child, if requested by the registrar to do so, is bound to inform the registrar of the particulars of the birth. The father in this case refused to give the information, and the whole argument turned on this, whether the Act did impose an unqualified obligation on the father; in other words, whether the statute was an empowering statute, and whether it was a statute which the father was bound to obey? The court came to the conclusion that the statute was not an empowering statute merely, but that the words of the clause were imperative and unambiguous, and

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that that being so, the father was indictable for having refused to do what the Act required him to do. That is another illustration of the principle that, where no other remedy is prescribed, the man may be indicted for disobedience to a statute. It does not establish the proposition in support of which it was referred to. The two cases to which I have last referred do not come exactly in chronological order, but I have referred to them together because they were used by the prosecution for the same purpose. The next case relied on was *Rex v. Gregory* (5 B. & Ad. 555). That was a very clear and simple case. The Act of Parliament which was there under discussion prohibited the erection of any building within a certain distance of the public road, and contained a positive enactment that, if any building should be erected contrary to the statute, it should be deemed a common nuisance. That was an express enactment that the doing of a prohibited thing was to be held to be a common nuisance. By another clause, magistrates were empowered to convict the proprietor, and to make an order for the removal of the building, and it was held that the party erecting the building was nevertheless indictable for a nuisance. From the language of the judgment it is plain that the learned judges relied upon the express language of the enactment itself. Denman, C.J. says: "I have not the least doubt in this case. The Acts expressly say that there shall be a road sixty feet wide, and that no building shall be erected within ten feet of that road. The erection in question is clearly a building within the Acts, and it is within the prohibited distance. As to the proceeding by indictment, it is true that the Act of 3 Geo. 4 gives a summary proceeding before magistrates, but it also declares that the erection of a building within the prohibited distance shall be deemed a common nuisance." And, adds the Lord Chief Justice, "every common nuisance is an indictable offence." In *Rex v. Gregory* (*ubi sup.*) there is an offence created for which the statute had provided a special remedy, but the act done was by a substantive clause created a common nuisance, and so became in itself an indictable misdemeanour. There are two other cases to which I must refer before I conclude my examination of the authorities. The first of them is *Reg. v. Buchanan* (8 Q. B. 883). There a statute had prohibited in general terms persons from acting as attorneys in any court, unless such persons should have been previously admitted and enrolled; and in a later part of the same statute it had been enacted that any person who did act without being admitted and enrolled should be unable to recover fees, and should be guilty of contempt of court, and should be punished accordingly. It was held that an unqualified person might be indicted under the substantive prohibitory clause. And in giving the judgment of the court, Lord Denman says: "I am of opinion that, wherever a person does an act which a statute on public grounds has prohibited generally, he is liable to an indictment. I quite agree that where, in the clause containing

the prohibition, a particular mode of enforcing the prohibition is prescribed, and the offence is new, that mode only can be pursued; the case is then as if the statute had simply declared that the party doing the act was liable to the particular punishment. But where there is a distinct absolute prohibition the act is indictable." That case would be very much in point if there had been an absolute prohibition of the various wilful acts charged against this defendant in any other part of the Act of Parliament. There is none, and that really is what has weighed with me greatly in deciding this case. I find in the very section which enumerates with painful particularity every possible breach of duty which an overseer can commit, that a specific remedy is provided. And therefore the reasoning of a case like this, where there was a general prohibition in the earlier part of the statute and a subsequent penalty in another part of the statute, is inapplicable, in my opinion, to this case. The last authority that was cited to me was the case of *Couch v. Steel* (3 E. & B. 402), a case in which it was held that the non-supply of medicines on board an English ship, in contravention of the 7 & 8 Vict. c. 112, was actionable by a sailor whose health had been injured by such failure to supply medicines. The question that was argued there was, whether the party aggrieved had any right of action for that breach of statutory duty, and it was held that, although the statute had given a penalty which might be recovered at the suit of anybody, still anyone who was personally injured by that breach of public duty could maintain an action for damages. I may say that in a recent case a great deal of the reasoning in *Couch v. Steel* (*ubi sup.*) has been dissented from by the Court of Appeal. It was considered much in the case of *Atkinson v. The Newcastle and Gateshead Waterworks Company* (36 L. T. Rep. N. S. 761; 2 Ex. Div. 441), decided in 1877, first in the Exchequer Division and afterwards in the Court of Appeal. Still, the case is an authority, and may properly be cited as an authority. But the only point decided by it was, that the penalty prescribed by the statute did not exclude the plaintiff from his right of action. The case, however, was referred to on account of some of the language used by Lord Campbell in giving the judgment of the court. Lord Campbell says, at p. 411: "Sect. 18 of statute 7 & 8 Vict. c. 112, which creates the duty, also makes the party who ought to perform it liable for a penalty for non-performance, to be recovered at the suit of any person, and to be applied in part to the informer, and the residue to the Seaman's Hospital Society. The penalty being annexed to the offence in the very clause of the Act creating it, no indictment or other proceeding could be taken against the person making default for the mere breach of the duty cast upon him by the Act. The duty being one of a public nature, the defaulter would be subject by the common law to an indictment for a breach of it, except for the particular mode of punishment by a penalty prescribed by the Act. As far as the

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public wrong is concerned, there is no remedy but that prescribed by the Act of Parliament." The prosecution drew my attention to the words, "the penalty being annexed to the offence," in the very clause of the Act creating it; and Mr. Mathews argued that because the duty was created by one section of the Act, and the penalty in another, an indictment would be still maintainable for breach of duty. The Lord Chief Justice, I am sure, never meant to say that it was essential, where a duty was prescribed by a section, that the remedy should be contained in the same section. That has never been held. All the authorities have laid down is, that where there is a substantive general prohibition in one clause, and a subsequent clause containing a specific remedy, that there the remedy by indictment is not excluded. I have now examined, I think, all the authorities that have been cited to me during the argument, and I repeat that they appear to me, when properly understood, to support the conclusion at which I have arrived, namely, that upon the true construction of this statute creating, or re-creating, a new duty, and prescribing a particular penalty for a wilful neglect of that duty, remedy by indictment is excluded. It remains for me to say a word or two on the 16th and 17th counts of this indictment. The substance of the case has been decided; the only remedy against this defendant for the breach of duty which it is alleged he has committed is the remedy provided by the Registration Act. But then an effort is made to turn the difficulty, if I may use the expression, by framing two counts on the authority of a very recent case, the case of *Reg. v. Vreones*. That case has not yet been reported, (a) but I was a party to the judgment, and I therefore have it fresh in my recollection. That was a very singular case, but when the facts which were reported by the learned judge who tried the case were brought under our consideration it was a tolerably clear one. There the defendant had falsified certain samples which were called arbitration samples. The matter arose in this way: Where a dispute arises in Bristol between the buyer of a cargo and the seller of it as to the cargo, the parties agree to refer it to arbitration, and there is a tribunal of arbitrators, or rather a committee, who from time to time appoint an arbitrator *ad hoc*, to decide disputes which may arise. The custom of the trade is to take samples of the cargo, specimens of the bulk, and to forward those specimens to the tribunal who appoint the arbitrator *ad hoc*, and those samples are called arbitration samples, and upon the truthfulness of those samples the tribunal acts. What Vreones did was this, he falsified the arbitration samples; in other words, he placed before the tribunal, which had to appoint the arbitrator, for the purpose of their being laid before the arbitrator, false samples upon which the arbitrator was bound to act, and thus it was obvious directly interfered with the proper course of the proceedings before the

(a) Now reported, *ante*, p. 267; 64 L. T. Rep. N. S. 889; (1891) 1 Q. B. 860.

arbitrators, because they would come to the conclusion, from looking at those samples, that the cargo was what in fact it was not, and therefore it was beyond all doubt an indictable fraud. But I cannot apply the reasoning of the case of *Reg. v. Vreones* to this case, for the lists prepared by the overseers are not laid by him before the revising barrister at all. As I have said, they are published openly, and copies are kept, and the utmost facility is given to everybody to see and correct the lists before they are even transmitted by the overseer to the town clerk, and it is the town clerk's duty afterwards to take them to the revising barrister for the purpose of his revising the lists. Therefore it seems to me that these two counts, the first of which refers to the electoral lists, the second to the register, cannot be sustained. They charge (if they charge anything) an attempt on the part of the defendant to commit what I have held to be a not indictable misdemeanour. Upon the whole, therefore, I think it is my duty to say that this indictment must be quashed.

Indictment quashed.

Solicitor for the Crown, *The Solicitor to the Treasury.*

Solicitor for the defendant, *E. T. Hargraves.*

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CROWN CASES RESERVED.

Thursday, May 14, 1891.

(Before Lord COLERIDGE, C.J., DENMAN, MATHEW, CAVE, and CHARLES, JJ.)

REG. v. MARSDEN. (a)

Evidence—"Unlawful and carnal knowledge"—Necessity for proof of emission as well as of penetration—Criminal Law Amendment Act, 1885—48 & 49 Vict. c. 69, s. 4.

In order to support a conviction for unlawful and carnal knowledge of a female, it is not necessary to prove that emission took place, proof of penetration being sufficient.

CASE stated by R. S. Wright, J., as follows:—

James Marsden was convicted before me at Manchester, on the

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

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knowledge”—
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Amendment
Act, 1885.

28th day of April, upon an indictment containing a single count for the felony created by the statute 48 & 49 Vict. c. 69 (Criminal Law Amendment Act, 1885), s. 5, namely, carnal connection with a female under the age of thirteen years.

The jury were satisfied of penetration, but I directed them that there was no evidence of emission, and that under the circumstances of the case it could not be presumed.

At the trial I reserved the question whether the prisoner could lawfully be convicted of the said felony, emission being negatived.

In a note to the case the learned judge stated that the child upon whom the offence was alleged to have been committed was aged ten.

By sect. 4 of the Criminal Law Amendment Act, 1885, it is enacted that “Any person who unlawfully and carnally knows any girl under the age of thirteen years shall be guilty of felony.”

No one appeared on behalf of the prisoner.

The *Solicitor-General* (Sir E. Clarke) and *Sutton*, for the prosecution, were not called upon.

LORD COLERIDGE, C.J.—We think it clear that this conviction is right, and must be sustained. No doubt, upon the rulings of single judges, and on doubts expressed by some judges, and especially by my learned brother Charles, it was uncertain whether proof of penetration merely was sufficient proof of carnal knowledge. We are clearly of opinion, however, that where the words “carnal knowledge” are used in a statute as constituting an offence they are to be considered to be fully made out or satisfied without proof of emission having taken place, and that the law remains the same as it has been for the last sixty years. We think it right to add that my learned brother Wright was fully justified in reserving this case, but we none of us entertain the slightest doubt but that carnal knowledge is completely proved where there is proof of penetration. In our opinion, therefore, this conviction must be sustained.

Conviction affirmed.

Solicitor for the prosecution, The Solicitor to the Treasury.

CROWN CASES RESERVED.

Saturday, April 25, 1891.

(Before Lord COLERIDGE, C.J., DENMAN, MATHEW, CHARLES, and WILLIAMS, JJ.)

REG. v. GRAY. (a)

False pretences—Intent—Verdict of jury—Inconsistent findings—Prisoner found guilty of obtaining food and money by false pretences—Recommendation to mercy because of insufficiency of evidence as to intent to defraud.

Upon an indictment for obtaining food and money by means of false pretences, the false pretence alleged being that the prisoner was a bank clerk and received his salary once a fortnight, the jury found the following verdict: "Guilty of obtaining food and money under false pretences. But whether there was any intent to defraud, the jury consider there is not sufficient evidence, and therefore strongly recommend the prisoner to mercy." The Recorder, before whom the trial took place, accepted the verdict as being a verdict of guilty upon the authority of Reg. v. Naylor (13 L. T. Rep. N. S. 381; 10 Cox C. O. 151; 35 L. J. 61, M. C.; 11 Jur. N. S. 910; 14 W. R. 58), where it was held that the crime of obtaining goods by false pretences is complete, although, at the time when the prisoner made the pretence and obtained the goods, he intended to pay for them when it should be in his power to do so. Upon a case reserved, it was argued in support of the conviction that the verdict was separable, the latter portion of it being merely the reasons given by the jury for their recommendation; and that, if it was not separable, inasmuch as the falsity of the pretence alleged must of necessity have been known to the prisoner, the only possible meaning which could be given to the latter portion of the verdict was that the jury considered that at the time the prisoner obtained the food and money he intended at some future time to pay for the food and repay the money.

Held, that the verdict was not separable; and that, inasmuch as the latter portion of it negatived the intent to defraud without proof of which the previous portion of the verdict could not have been found, the conviction could not be supported.

THE defendant was tried before me at the Quarter Sessions for the borough of Walsall on the 30th day of October, 1890. The indictment charged the defendant "for that between the

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

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24th and 26th days of September, 1890, both inclusive, he unlawfully, knowingly, and designedly did falsely pretend to Sarah Ann Mason that he was then employed by the Birmingham and Midland Bank Limited at Walsall, and that he received his salary from the said bank once a fortnight," by means of which false pretences he did then unlawfully obtain from the said Sarah Ann Mason certain food to the amount of five shillings and one sovereign in money, the goods, chattels, and moneys of the said Sarah Ann Mason, with intent to defraud, whereas in truth and in fact he was not then employed by the said Birmingham and Midland Bank Limited; and whereas in truth and in fact he did not receive any salary from the said bank once a fortnight or otherwise, as he then well knew.

It was proved that on the 24th day of September, 1890, the defendant went to the house of the prosecutrix, who is a single woman, and asked her if she had a sitting room and bedroom to let. He said his name was "Gregory Gray," and that he came from the Birmingham Bank, Walsall. He wanted the rooms for himself and a friend. Upon this statement, and believing that he came from the Birmingham Bank, Walsall, she agreed to let him have a sitting room and a bedroom for himself and a friend for nine shillings per week. He entered on the 24th day of September, and said his friend had gone on his holidays, and would join him on the following Monday. At his request she got a steak for his dinner. On the next day, the 25th day of September, he told the prosecutrix he had given all his spare money to his friend to get him out of a bother, and asked her to lend him a sovereign, adding that he had his salary from the bank once a fortnight, and would repay her on the following Monday. She lent him a sovereign, for which he then wrote and gave her a written acknowledgment. On the next day Friday, the 26th day of September, the prosecutrix made inquiries at the banks in Walsall, and then communicated with the police, who at 2.30 p.m. on the same day arrested the defendant in Walsall, by a detective, who said to him: "I shall charge you with obtaining food and money from Miss Mason under false pretences—you said you've been employed at the bank." The defendant replied: "I know I've told a lie. I'm not employed at any bank." A purse was found upon him, containing a sovereign and sundry other things. The defendant said his proper name was Howard, but he was going under the name of Gray. In cross-examination the prosecutrix said she had since the defendant's arrest been paid the five shillings due to her for the food supplied to the prisoner. A witness was called for the defendant, who said he had known him and his family for twelve years. He had hitherto borne a good character, and was a member of a very respectable family.

After my summing up the case the jury retired to consider their verdict, and upon their return handed to me a paper which they said contained their verdict. It read as follows: "Guilty

of obtaining food and money under false pretences, but whether there was any intent to defraud the jury consider there is not sufficient evidence, and therefore strongly recommend the prisoner to mercy." I accepted the verdict and discharged the jury. Counsel for the prisoner then contended that the jury by their verdict had negatived the intention to defraud, and consequently the defendant was entitled to have a verdict of not guilty entered for him. To consent to such a course appeared to me contradictory not only of all the sworn testimony for the prosecution, but even of the inconsistent finding of the jury; still, as the prisoner's counsel asked for a judgment and a case for decision by the Court for Crown Cases Reserved, quoting *Reg. v. Naylor* (L. Rep. 1 C. C. R. 4), I sentenced the prisoner to be imprisoned for three months with hard labour, granted to his counsel a case to this Court of Appeal, and, until your Lordships' determination could be had, liberated, with the usual necessary conditions, the prisoner upon bail pending such determination.

The question for the consideration of the court is, whether, upon the finding of the jury and the facts stated, the conviction of the prisoner Gray should or should not be affirmed.

Jesse Herbert, for the prisoner, submitted that the allegation of an intent to defraud was so essential a part of an indictment for false pretences that in *Reg. v. James* (12 Cox C. C. 127) Lush, J. refused to amend such an indictment which did not allege such an intent on the ground that the words "with intent to defraud" were a material part of it, and held that their omission was fatal. It was therefore clear that where a jury arrived at a conclusion on the facts that there was not sufficient evidence of an intent to defraud, an essential part of the indictment was not made out.

Vachell, for the prosecution, submitted that the conviction should be sustained upon two grounds: first, because, the jury having found the defendant guilty, the rest of their verdict was to be considered merely as containing the grounds for the recommendation to mercy; and secondly, because, if the verdict was to be read as a whole, the only reasonable meaning which could be attached to it was that they considered that at the time the defendant obtained the food and money he intended to repay the prosecutrix if he was ever in a position to do so, and if this was the real meaning of the verdict the case of *Reg. v. Naylor* (*ubi sup.*) was an authority that the conviction was sustainable.

LORD COLERIDGE, C.J.—I am of opinion that this conviction cannot be sustained. The facts are clear enough that the pretence was untrue in fact, and being untrue in fact it would follow that it was untrue to the prisoner's knowledge. For the pretence being that he was a clerk in a bank, and as to the time when his salary would be paid him, the pretence being about himself he must have known that it was untrue. By means of this false pretence, that he was a clerk in a bank at Walsall, and that his salary was paid him every fortnight, he obtained food

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and a sovereign, and upon these facts the jury find a written verdict; they might have found the prisoner simply guilty or not guilty, but they did not do so, they found what may be described as a special verdict, namely, that the prisoner was "guilty of obtaining food and money under false pretences, but whether there was any intention to defraud the jury consider there is not sufficient evidence, and therefore strongly recommend the prisoner to mercy." It is difficult, here, no doubt, to say that if the pretences were false they could have been otherwise than false to the prisoner's knowledge; but it may be that the jury thought—I do not mean to say that the jury were quite beyond the pale of reasonable beings if they so thought—but it is possible that they may have thought that there was not sufficient evidence that the prisoner knew the pretence was false. The learned Recorder, guided by *Reg. v. Naylor (ubi sup.)*, thought that the verdict amounted to a verdict of guilty, but it is to be observed that the jury in that case found that the prisoner at the time he made the pretence and obtained the goods intended to pay the prosecutrix the price of them when it should be in his power to do so; and the question was not whether the prisoner had any intention to defraud, but whether, at the time he made the false pretence, he intended to repay the money, and the jury found that at some time or other he did intend to do so. As my brother Mathew has reminded me, that is what every person who is guilty of a false pretence may intend. But the act is complete, and the intent at the time is distinct, and is made out by the act; moreover there must be evidence from which the jury must infer the intent. I say that because my learned brother Charles put a question in the course of the argument which it was found very difficult to answer. He asked, "Is it a necessary part of the averments in the indictment that an intent to defraud should be alleged?" and Mr. Vachell was obliged to answer "Yes." He then asked, "If it was a necessary averment, was it not necessary that it should be proved?" and again Mr. Vachell was obliged to answer "Yes." But that is what the jury have not found here. In *Young v. Rex* (3 T. R. 98; 1 Leach C. C. 505) and *Hamilton v. Reg.* (2 Cox C. C. 15; 9 Q. B. 276; 16 L. J. 9, M. C.; 10 Jur. 1028) it is laid down that the intent to defraud must be stated as part of the fraud alleged, and it follows that if it must be stated it must also be proved; and, as it was not found to have been proved here, this conviction must be quashed.

DENMAN, J.—I am entirely of the same opinion. If the verdict had been guilty merely, no question could have arisen. But when the jury go beyond the mere verdict of guilty or not guilty and add words, they at once give rise to the question whether their verdict is sufficient. The jury have added to their verdict of guilty here the words: "But whether there was any intent to defraud the jury consider there is not sufficient evidence, and therefore strongly recommend the prisoner to mercy." Mr. Vachell has

very ingeniously endeavoured to extract that from the verdict altogether. He says that practically it was not part of the verdict, but was merely the reason for the recommendation to mercy. But I think it was part of the verdict, and it seems to me that it is impossible to reject it. If then it is part of the verdict, it is clear that it must be taken as negating one of the most material allegations contained in the indictment, namely, the intent to defraud. That being so, it appears to me impossible to make out that this is a verdict of guilty. Looked at as a whole, it seems to me that the jury shrunk from holding that there was any intent to defraud; and I am therefore of opinion that this conviction should be quashed.

MATHEW, J.—I am of the same opinion. Mr. Vachell says that this conviction must be upheld because the prisoner was found guilty. But when we look at the verdict we find that the jury, so far from intending to find that there was an intent to defraud, found that there was not sufficient evidence of such an intent. The verdict is therefore, as the learned Recorder himself said, “inconsistent,” and the conviction cannot, in my opinion, be upheld.

CHARLES and WILLIAMS, JJ. were of the same opinion.

Conviction quashed.

Solicitor for the prosecution, *The Solicitor to the Treasury.*

Solicitor for the prisoner, *Otterell, Walsall.*

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COURT OF APPEAL.

Wednesday, July 2, 1891.

(Before Lord ESHER, M.R., BOWEN and KAY, L.JJ.)

ROOK v. SCHOFIELD. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Practice—Appeal—Jurisdiction—“Criminal cause or matter”—
Order to abate nuisance—Refusal to state a case—Application
for mandamus—Public Health Act, 1875 (38 & 39 Vict. c. 55),
ss. 91, 96—Supreme Court of Judicature Act, 1873 (36 & 37
Vict. c. 66), s. 47.*

The refusal by the Queen's Bench Division of an order nisi for a

(a) Reported by J. HERBERT WILLIAMS, Esq., Barrister-at-Law.

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mandamus to a magistrate to state a case for the opinion of the court upon a summons under sect. 91 of the Public Health Act, 1875, in respect of a smoke nuisance, is a "judgment of the High Court in a criminal cause or matter," within the meaning of sect. 47 of the Supreme Court of Judicature Act, 1873, from which no appeal lies to the Court of Appeal.

THIS was an appeal, *ex parte*, from the refusal of a Divisional Court (Cave and Charles, JJ.) to grant a rule *nisi* for a *mandamus* calling upon the stipendiary magistrate of Manchester to show cause why he should not state a case for the opinion of the court.

The appellant, Schofield, was served with a notice by the council of the city of Manchester, under sect. 91 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), to abate a nuisance consisting of a chimney sending forth black smoke in such quantity as to be a nuisance. A summons was issued, and the stipendiary magistrate made an order commanding Schofield to abate the nuisance within seven days, and for that purpose to provide and maintain smoke-consuming apparatus, and further prohibiting the recurrence of the nuisance, and ordering him to pay 8s. for costs. Thereupon the said Schofield duly applied to the magistrate to state a case, pursuant to 42 & 43 Vict. c. 49, s. 33, for the opinion of the Queen's Bench Division, and the magistrate refused to state a case. Schofield then applied, *ex parte*, to the Queen's Bench Division for a rule *nisi* for a *mandamus* to compel the magistrate to state a case, which was refused. The applicant then applied, *ex parte*, by way of appeal to the Court of Appeal for a rule *nisi*, when the objection was raised by the court that there was no jurisdiction to hear the appeal.

Sir Horace Davey, Q.C. and Joseph Walton for the applicant. —This is not an appeal from the judgment of the High Court in a "criminal cause or matter" within the meaning of sect. 47 of the Judicature Act, 1873. The applicant has a right to have a case stated pursuant to 42 & 43 Vict. c. 49, s. 33, and the application for a *mandamus* to a magistrate to state a case is an application to enforce a civil right which arises out of a criminal matter. It must be admitted that the proceedings before the magistrates were of a criminal character (*Reg. v. Whitchurch*, 45 L. T. Rep. N. S. 379; 7 Q. B. Div. 575); but the application to the Divisional Court did not involve any criminal cause or matter, but only the construction of a section of a public Act of Parliament. *Mandamus* is a civil proceeding, and therefore an application for an order to state a case is a purely civil proceeding. This application is not an application to quash or to review the decision of a magistrate in a criminal matter, but only to order him to state a case under a statute, and the application itself has no effect whatever upon the criminal proceeding before the magistrate. The wide interpretation of "judgment in any criminal cause or matter" laid down in *Ex parte Woodhall*

(59 L. T. Rep. N. S. 841; 20 Q. B. Div. 882), and *Reg. v. Whitchurch* (45 L. T. Rep. N. S. 379; 7 Q. B. Div. 575), seems to have been rather modified by the House of Lords in *Bell-Cox v. Hakes* (63 L. T. Rep. N. S. 392; L. Rep. 15 App. Cas. 506).

LORD ESHER, M.R.—I think that we must adhere to the opinion which we expressed in *Ex parte Woodhall* (*ubi sup.*), which seems to me to conclude this case. In this case the appellant applied to the Queen's Bench Division for a rule *nisi* for a *mandamus* to the stipendiary magistrate of Manchester to state a case for the opinion of the court upon his decision on a summons under sect. 91 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), and that rule was refused. We have raised the objection that this court has no jurisdiction to hear an appeal against that refusal to grant a rule *nisi* for a *mandamus*. That the decision of the magistrate under sect. 91 of the Public Health Act, 1875, was a proceeding in a "criminal cause or matter" within the meaning of sect. 47 of the Judicature Act, 1873, is clear. It is argued, however, that an application for a *mandamus* is not a proceeding in a "criminal matter," but that it is only an application to state a case for the opinion of the court, and has no legal effect whatever upon the question whether the decision of the magistrate was right or wrong. But in this appeal we are asked to compel him to state a case, which he refused to state. The proceeding before him was a criminal cause or matter, and we are asked to order him to take a step in a criminal cause or matter which would have the effect of causing his decision to be reviewed. Now, in the case of *Ex parte Alice Woodhall* (*ubi sup.*), I said: "We consider that we ought not any longer to flinch from determining whether we have, or have not, jurisdiction to hear an appeal in such a case as this; and we desire to rest our decision, not upon the facts of the particular case, but upon the determination of the question of jurisdiction." The court, therefore, deliberately undertook to determine, in that case, when there was, and when there was not, jurisdiction to hear such appeals. I then went on to say: "The result of all the decided cases is to show that the words 'criminal cause or matter' in sect. 47 should receive the widest possible interpretation. The intention was that no appeal should lie in any 'criminal matter' in the widest sense of the term, this court being constituted for the hearing of appeals in civil causes and matters. . . . In the present case I think I must try to express my meaning in other words. I think that the clause of sect. 47 in question applies to a decision by way of judicial determination of any question raised in or with regard to proceedings, the subject-matter of which is criminal, at whatever stage of the proceedings the question arises." The appeal here is against the decision of a Divisional Court refusing a rule *nisi* for a *mandamus*, and I think that that refusal was a decision by way of judicial determination of a question raised in or with regard to proceedings, the subject-matter of which was criminal. The ques-

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36 & 37 Vict.
c. 66, s. 47.

tion arises at the stage when the Queen's Bench Division refused to issue a *mandamus*, and their decision was a judicial determination, and this case comes directly within the definition I have already read. In the case of *Reg. v. Whitchurch (ubi sup.)* the Queen's Bench Division made absolute a rule for a *certiorari* to quash an order of justices made under sect. 94 of the Public Health Act, 1875, and it was held in this Court that the order of the justices was made in a "criminal cause or matter" within the meaning of sect. 47 of the Judicature Act, 1873, and that an appeal from the judgment of the Queen's Bench Division could not be entertained. There the application was for a *certiorari* to bring up proceedings like these under the same Act to see if the magistrate acted rightly or wrongly, and this court said that it could not entertain an appeal from a decision of the Queen's Bench Division granting such *certiorari*; here the application was for a *mandamus* to the magistrate to state a case in order that the court might determine whether his decision was right or wrong. I think that there is no distinction between the two cases, and that this case is governed by the reasoning in *Reg. v. Whitchurch (ubi sup.)* and *Ex parte Woodhall (ubi sup.)*. We have no jurisdiction to hear this appeal, and it must be dismissed.

BOWEN, L.J.—I am of the same opinion. The proceedings before the magistrate are admitted to have been criminal proceedings, and the case of *Reg. v. Whitchurch (ubi sup.)* puts that question beyond all controversy. Then the question arises whether we can hear an appeal against the refusal of the Queen's Bench Division to grant a rule *nisi* for a *mandamus* to the magistrate to state a case in those proceedings. If we decide that there is an appeal against that refusal we go against the current of authorities during the last fifteen years, commencing with *Reg. v. Fletcher* (35 L. T. Rep. N. S. 538; 2 Q. B. Div. 43) and *Reg. v. Steel* (35 L. T. Rep. N. S. 534; 2 Q. B. Div. 37) down to the case of *Reg. v. Woodhall (ubi sup.)*. The intention of the Judicature Act, 1873, is plain that the Court of Appeal should not interfere with the criminal proceedings of the country. We should so interfere if we entertained an appeal for the purpose of compelling a magistrate to state a case in a criminal matter which is a step in a criminal proceeding. There is no jurisdiction to hear this appeal, which therefore fails.

KAY, L.J.—There is a plain way of stating this case. The magistrate made an order in a criminal proceeding; that order involved a point of law; the parties desired to bring that point of law before the Queen's Bench Division; that was a matter for the Queen's Bench Division, and the appellant asked the magistrate to state a case for that purpose; he refused, and an application was made to the Queen's Bench Division to compel him to do so; that application was refused; the statute under which the proceedings were taken gives no right of appeal. In my opinion the endeavour to get the decision of the magistrate upon a point of

law altered is clearly a step in a criminal matter, as to which the Judicature Act, 1878, has said that there shall be no appeal to this court.

Appeal dismissed.

Solicitors: *Collis and Mallam*, for *Cobbett, Wheeler*, and *Cobbett*, Manchester.

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QUEEN'S BENCH DIVISION.

Thursday, April 30, 1891.

(Before DAY and LAWRENCE, JJ.)

CAMINADA (app.) v. HULTON (resp.). (a)

Gaming—Betting—Advertising as to betting—Racing Record—Lottery—Prizes for selecting winning horses—The Betting Acts, 1853 and 1874 (16 & 17 Vict. c. 119, ss. 3, 4; 37 Vict. c. 15, s. 3, sub-sect. 3)—Lottery Act (4 Geo. 4, c. 60), s. 41.

The respondent, a newspaper proprietor, published weekly a "Racing Record," which contained information as to races which had been recently run, and as to those which were about to take place; at the end of the book was a coupon, which the purchaser of the book might cut off, and after writing upon it the names of the horses which he thought would win the six races mentioned on it might send to the respondent's office; the respondent offered prizes to the persons who selected six, five, or four winners, the prizes varying in amount according to the number of winners selected.

The "Racing Records" were sold principally through newsvendors or stationers, and a few copies only were sold by the respondent over the counter at his office.

Held, that the respondent had not committed any offence under either the Betting Act or the Lottery Act.

THIS was a case stated by the stipendiary magistrate in and for the city of Manchester, under the statute 42 & 43 Vict. c. 43, for the purpose of obtaining the opinion of the High Court on questions of law which arose before him as hereinafter stated.

1. At a petty sessions holden at Minshull-street, in and for the city of Manchester, being a court of summary jurisdiction, on the 26th day of September, 1890, and the 17th day of October,

(a) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

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4 Geo. 4, c. 60,
s. 41—16 & 17
Vict. c. 119,
ss. 3, 4—87
Vict. c. 15,
s. 3 (3).

1890, an information preferred by Jerome Caminada, hereinafter called the appellant, against Edward Hulton, hereinafter called the respondent, under 37 Vict. c. 15, s. 3, sub-sect. 3, charging for that he, the said Edward Hulton, on the 18th day of August, 1890, did invite persons by advertisement exhibited and published in a certain book called the *Sporting Chronicle Weekly Handicap Book or Racing Record*, to take a share in connection with a certain bet or wager, contrary to the form of the statute aforesaid, was heard and determined by the said stipendiary magistrate, the said parties respectively being then present, and the respondent having duly elected to be tried, and upon such hearing the said magistrate dismissed the said information.

Upon the hearing of the information the following facts were proved on the part of the appellant by the following witnesses, who were called on his behalf, and having been duly sworn, gave evidence as follows :

Jerome Caminada, Chief Detective Inspector of the Manchester City Police, said that on Monday, the 18th day of August, 1890, he went to the *Sporting Chronicle* office at Mark-lane, Withy Grove, in the city of Manchester, and purchased two copies of *The Sporting Chronicle Weekly Handicap Book or Racing Record*. He paid one penny each for the said books. The said handicap books were published on Saturday, the 16th day of August, 1890. He also purchased copies of the *Sporting Chronicle* from the said office for July 5, Aug. 9, Aug. 16, and Aug. 23, 1890, respectively, for which he paid one penny each. He produced the said handicap books and copies of the *Sporting Chronicle*.

John Howe said that he lived at 4, Birch-street, Hightown, Manchester, and was a journalist in the employment of the respondent, and did his work at the *Sporting Chronicle* offices at Mark-lane, Withy Grove. That the respondent was the proprietor and publisher of *The Sporting Chronicle* and also of the *Sporting Chronicle Weekly Handicap Book or Racing Record*. He compiled for the respondent the two Handicap Books produced. The Handicap Books are issued under the directions of the respondent. The system of issuing the Handicap Books with the coupons attached has been going on for a considerable time, and is still carried out. The purchaser of the Handicap Book fills up the coupons if he so chooses, according to the published regulations, and returns them to the respondent's offices. He (the witness) then examines the coupons so returned, and forwards any sum of money that may be found to be due to the purchaser of the coupon. 2700 coupons of the Handicap Book published on the 16th day of August, 1890, were returned to the offices duly filled up. He examined them and found that not one coupon contained six winners or even five; one coupon contained four winners, and a sum of 10*l.*, called a "consolation award," was forwarded to the person sending in that coupon. This result was published in *The Sporting Chronicle* of Aug. 23, 1890. The witness produced a copy of *The Sporting Chronicle* for Jan. 26, 1890, containing the conditions of the competitions in the Weekly Handicap Books. This is the last date on which such conditions were published. The witness upon cross-examination further said that the respondent's offices at 2, Mark-lane, Withy Grove, are publishing offices, at which the respondent prints and publishes three newspapers, *The Sporting Chronicle*, *The Sunday Chronicle*, and *The Athletic News*, also books such as *The Sporting Chronicle Annual* or *The Football Annual*, besides general printing for customers. The offices are large offices rated at 875*l.* per annum, containing plant worth 14,000*l.* There is a staff of 200 persons employed on the premises, consisting of an editor, sub-editor, reporters, compositors, machinemen, stereotypers, publishers, and clerks, and the business carried on there is the ordinary business of a newspaper printing and publishing office, and of a general printer. As far as the witness knew no betting went on on the premises, and the premises are not used in any way for betting purposes. The Handicap Book of Aug. 16, 1890, is a fair specimen of the Handicap issued by the respondent. They are all alike as regards the general character of their contents, and are published every week. Pages 1 to 10 contain news and information with reference to past racing events. Part of page 10 and the whole of page 11 is an index. Pages 12 to 80 contain information with reference to future events, and on page 81 is the coupon. The witness said that he prepared the books

from Messrs. Weatherby's *Calendar* among other things, and from other information at his disposal. They are intended to give information as to entries, weights, trainers, horses struck out, disqualifications, and nomenclature, and apart from the coupon the Handicap Book would be useful to persons taking an interest in racing events as a handy book of reference. The book is largely purchased by people interested in racing matters as a handy book for reference quite apart from any interest in the coupon. It lay with the witness to select six races to be placed on the coupon. He would pick out such races carefully with a view to make them difficult. There are some races he considered much too easy to put in. He considered knowledge and experience in racing matters would be of service to a person filling up a coupon, and such a person would be more likely to succeed in filling up the coupon accurately than a person who made a mere guess. The publication of Handicap Books containing coupons by the respondent has continued since the 19th day of March, 1887. On six occasions coupons have been filled up with six winners, fifty-six times with five winners, and sixty-nine times with four winners. When the coupons were returned nothing was done but to make a simple examination of them, and prepare a list of the successful ones. Upon examination the witness further said that, as far as he knew, the respondent had never since March, 1887, advertised the Handicap Books without advertising them in connection with the coupons. The information containing weights, entries, trainers, &c., published in any Handicap Book was always given about the six races named on the coupon of that book; but such information was not confined to those six races. That information was given amongst other information.

Thomas Sugden, of Oak Villas, Levenshulme, said that he was cashier to the respondent of the Handicap Book published by the respondent on the 16th day of August, 1890; there was an edition of 48,000; of this edition 88,235 copies were sold, and 104*l.* 18*s.* 1*d.* were the gross receipts of the sale of these copies. Upon cross-examination, the witness further said that the Handicap Books were sold wholesale to large wholesale dealers at eightpence for thirteen. Newspapers pay ninepence for thirteen. Of the Handicap Book published on the 16th day of August, 1890, 19,157 copies were sold at eightpence for thirteen, 18,687 copies were sold at ninepence for thirteen, 380 copies were sold through the post at one penny each, and eleven copies were sold over the counter at one penny each. The sale to newsvendors are made out and out, subject to the right to return unsold copies. The witness said that he had nothing whatever to do with the Handicap Books after they left his possession, unless they were returned. The newsvendors sell the books for one penny each. Amongst the wholesale people are Messrs. W. H. Smith and Sons, John Heywood, and Abel Heywood. In such cases there are at least two persons between the publisher and the person who fills up the coupon, each making their own profit out of the book. The witness made out the average weekly profit to the respondent on the Handicap Books, after making all proper deductions and deducting the amount paid in prizes, to be 17*l.* 10*s.* Since the 19th day of March, 1887, 2496*l.* 8*s.* 7*d.* has been paid to those successfully filling up the coupons, that is a weekly average of about 14*l.* Upon re-examination, the witness said that out of the 104*l.* 18*s.* 1*d.*, the gross receipts of the Handicap Book published on the 16th day of August, 1890, the profit to the respondent was 21*l.*

Upon the part of the appellant it was contended that the coupon attached to the Handicap Book was an invitation of persons by advertisement exhibited and published in the said book to take a share in connection with a bet or wager, contrary to 87 Vict. c. 15, s. 3, sub-s. 3. Upon behalf of the respondent it was contended, first, that the transaction of purchasing a Handicap Book, filling up the coupon attached thereto, and returning the same to the respondent, did not amount to a bet or wager at all; secondly, that if it did amount to a bet or wager, it was not a bet or wager within the meaning of the statute aforesaid. The stipendiary magistrate was of opinion that the transaction proved was not a bet or wager, and that it was not a bet or wager made at a house or place opened, kept, or used for that purpose, or otherwise within the meaning of the statute aforesaid, and dismissed the information, and gave his determination

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4 Geo. 4, c. 60,
s. 41—16 & 17
Vict. c. 119,
ss. 3, 4—37
Vict. c. 15,
s. 3 (3).

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4 Geo. 4, c. 60,
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s. 3 (3).

against the appellant in manner before stated. The question of law upon which the case was stated for the opinion of the court therefore was, whether the publication by the respondent, on the 16th day of August, 1890, of the *Sporting Chronicle Weekly Handicap Book*, with the coupon attached, was an invitation of persons by advertisement exhibited and published in the said Handicap Book to take a share in connection with a bet or wager contrary to 37 Vict. c. 15, s. 3, sub-sect. 3.

The coupon attached to the *Sporting Chronicle Weekly Handicap Book or Racing Record*, published on the 16th day of August, 1890, was in the following form:

To be sent to the *Sporting Chronicle*, Manchester.

The Weekly Coupon.

Eighty Pounds
for six winners on one coupon, or
Forty-five Pounds
for five winners on one coupon;
In case of general failure,
A Consolation Award of Ten Pounds.
for four winners on one coupon.

Full particulars appear weekly in the *Sporting Chronicle*.

The following races are selected for the ensuing week:

- PAGE.
(14.) Stockton Handicap Stockton (Tuesday).
(17.) Hardwick Stakes (Wednesday).
Wolverhampton (Tuesday).
(27.) Bradford Handicap
(24.) Staffordshire Welter
(25.) Wolverhampton Handicap (Wednesday).
(27.) Oxley Welter

This form must be filled up with a single selection for each race, and forwarded to the *Sporting Chronicle*, Manchester, the envelope to be marked "competition" on the outside. It must reach the office by the first post on Tuesday morning, except when sent beyond a radius of 200 miles from Manchester; in this case the coupon will be in time if received by the mid-day post. No letter will be recognised bearing later than Monday's post-mark. Competitors must abide by the conditions published in the *Sporting Chronicle*.

Name
Address

The conditions of the competition, which were produced by the witness, John Howe, were as follows:

CONDITIONS.

The competition is based upon the accumulative system, commencing with a prize of 20*l*, and in case of general failure increasing to 100*l*. The prizes are awarded for selecting winners of certain races named in the ensuing week's programme. The competitor naming six winners (a single selection for each race) will be entitled to 20*l*. In case of a general failure to select six winners, 15*l*. will be awarded to the competitor who successfully names five winners. Should there be more than one successful competitor the prize money will be equally divided. In the event of a general failure to name five winners, the prize money will be raised by 10*l*. the following week, increasing each week to the maximum sum of 100*l*. and 55*l*. A consolation prize of 10*l*. will be distributed amongst the competitors naming four winners correctly, but this additional prize will only be given when there has been a

general failure to win the higher prizes. In the case of none giving four winners, the consolation prize will, like the others, be on the accumulative principle; thus there would be 20l. for distribution the following week.

The races for which selections are invited are printed on the coupon attached to the *Weekly Handicap Book*, and after filling in his selections (one horse for each race only), the competitor must append his name and address. He will then detach the coupon from the book and forward it to the offices of the *Sporting Chronicle*, marked "Prize Competition." The coupons must reach our office not later than the first post on Tuesday morning, and the letter must bear Monday's postmark. Any coupon received after that time will be invalid. The result of the competition will be announced each week in the columns of the *Sporting Chronicle*. No coupon will be recognised which does not bear the name of the sender. All coupons forwarded by post to this office must be prepaid. No coupon will be received by us of which the cost of transmission is unpaid.

No selections will be entertained unless they are written on the coupon published with the Handicap Book. Any competitors claiming to have given a sufficient number of winners entitling him to a prize after the result of the competition has been announced, must deposit 5s. which will be forfeited in case that we find the statement is not correct, but returned if an error has been made in checking the coupons. Unless the claim is made within three days after the result has been published, no notice will be taken of it. Coupons delivered by hand will be received up to 9 p.m. to-day (Thursday); after that time they will not be received.

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Vict. c. 15,
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There were three further cases stated by the same magistrate upon questions of law, arising out of proceedings taken by the appellant against the respondent. Those proceedings arose upon three further informations against the respondent under 16 & 17 Vict. c. 119, s. 3; 16 & 17 Vict. c. 119, s. 4; and 4 Geo. 4, c. 60, s. 41, respectively. The facts in all four cases were the same, and the arguments were heard together.

16 & 17 Vict. c. 119, provides as follows :

Whereas a kind of gaming has of late sprung up tending to the injury and demoralisation of improvident persons by the opening of places called betting-houses, or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse races and the like contingencies, for the suppression thereof, be it enacted as follows :

Sect. 1. No house, office, room or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race or other race, fight, game, sport, or exercise, or as or for the consideration for securing, paying, or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law.

Sect. 3. Any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them; and any person who being the owner or occupier of any house, room, office, or other place shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid or either of them; and any person having the care or management of or in any manner assisting in conducting the business of any house, room, office, or place opened, kept, or used for the purposes aforesaid, or either of them, shall, on summary conviction, be liable to a fine, &c.

Sect. 4. Any person being the owner or occupier of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them, or any person having the care or management, or in any manner assisting in conducting the

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business thereof, who shall receive, directly or indirectly, any money or valuable thing as a deposit on any bet or condition of paying any sum of money or other valuable thing on the happening of any event or contingency of or relating to a horse race, or any other race, or any fight, game, sport, or exercise, or as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any such event or contingency, and any person giving any acknowledgment, note, security, or draft on the receipt of any money or valuable thing so paid or given as aforesaid, purporting or intended to entitle the bearer or any other person to receive any money or valuable thing on the happening of any such event or contingency as aforesaid, shall be liable to a fine, &c.

37 Vict. c. 15 enacts :

Sect. 3. Where any letter, circular, telegram, placard, handbill, or advertisement is sent, exhibited, or published—

(3.) Inviting any person to make or take any share in or in connection with any such bet or wager . . . every person sending, exhibiting, or publishing, or causing the same to be sent, exhibited, or published, shall be subject to the penalties provided in sect. 7 of 16 & 17 Vict. c. 119, with respect to offences under that section.

4 Geo. 4, c. 60, enacts :

Sect. 41. That if any person or persons . . . shall publish any proposal or scheme for the sale of any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances, except such lottery or lotteries as shall be authorised as aforesaid, such person or persons shall for every such offence, forfeit and pay the sum of fifty pounds, &c.

Poland, Q.C. (with him *Avory*) for the appellant.—It is submitted that the magistrate was wrong in not convicting the respondent. This was merely a gambling transaction, for a person might buy any number of these books and send the coupons in to the respondent. It is almost impossible for any person to obtain the first prize, for the races are picked out which will afford the greatest difficulty to a person guessing the winners. [DAY, J.—The difficulty of the undertaking does not constitute its illegality.] This transaction comes within the definition of a lottery as laid down by *Hawkins, J.*, in *Taylor v. Smetten* (11 Q. B. Div. 207). Even if it is not a lottery the transaction is in the nature of a bet.

Sir Charles Russell, Q.C. and *Joseph Walton* for the respondent.—In order to prove that the respondent has been guilty of an offence under the Betting Acts it is necessary to show, first, that his office was a gaming house within the meaning of those Acts ; and secondly, that he carried on betting there contrary to the Acts. There is nothing in point of law illegal in making wagers under certain conditions. The kind of betting aimed at by 16 & 17 Vict. c. 119, is described in the preamble to that Act, namely ready-money betting. In order to convict a person under the provisions of 37 Vict. c. 15, it is first necessary to prove that the betting, which is alleged to have taken place, is illegal under 16 & 17 Vict. c. 119. Now the first part of sect. 1 of the last-mentioned Act prohibits a house or office being kept for the purpose of the occupier betting with persons resorting thereto ; it cannot be contended in the present case that persons resorted to the respondent's office for the purpose of betting with him. Then the second part of the section deals with betting where money is paid in advance to the occupier of the house on

the promise to pay money on any event relating to any horse race; no such thing could be alleged against the respondent here. The respondent's object in publishing these books is to help the sport he is interested in, and in order to increase the sale of these sporting guides he gives these prizes. In order to make a bet there must be risk of loss on both sides; but here the purchaser of one of these books loses nothing, for he pays his penny for the information in the book. It is further submitted that this is not a lottery. [DAY, J.—We do not think you need trouble to argue that point.]

Poland in reply.—When a person goes to the respondent's office and pays a penny across the counter for one of these books the office is being used as a gaming house within the meaning of the Betting Acts. Whether the book is sent by post or given direct into the person's hand, it is submitted makes no difference.

DAY, J.—These are four appeals from the refusal of the stipendiary magistrate for the city of Manchester to convict the respondents under the Betting Acts or the Lottery Act. As to the latter, I am clearly of opinion that this was not a lottery, for there was no contrivance or device to obtain money by chance, and therefore it does not come within the scope of the Act. Indeed, we have had no reasonable argument addressed to us to the effect that it does come within the statute. It might be said, but I think with considerable difficulty, that this is a bet because a person by paying a penny for one of these books and returning the coupon to the respondent backed six horses. But I think that is clearly not the correct view to take, and that this is not a bet within the meaning of the statute. A person purchasing one of these books did not, even if he was not successful in obtaining one of the prizes offered, lose any money by the transaction. The scheme was devised by the respondent for the purpose of extending the business which he carries on, and for the sale of his books, and I think it cannot be regarded as a bet. If, as I say, this is not a bet, the house or office where these books were sold is not a betting house, but was only a newspaper office as described by the respondent. The prizes or rewards were very difficult to obtain and the chances indefinitely large against the success of a person sending in a coupon, and that I think removes this scheme altogether from betting. This office was not kept for the purpose of any money or valuable thing being received by or on behalf of the owner or occupier as the consideration for any assurance to pay thereafter any money or valuable thing on any event relating to any horse race. It is quite clear, having regard to the preamble and scope of the Act, that the object of it was to prevent what is known as ready-money betting, and to prevent persons from keeping offices for that purpose; this was not a case of ready money betting. The conclusion at which the magistrates arrived was quite correct, and these appeals must be dismissed. If this is considered a

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mischievous system, and one that has a demoralising effect, it must be stopped by the Legislature, as the court cannot extend the Act to embrace matters which were clearly not contemplated when the Act was passed.

LAWRANCE, J.—I am of the same opinion.

Appeals dismissed.

Solicitor for the appellant, *Solicitor to the Treasury.*

Solicitors for the respondent, *Collis and Mallam, for Cobbett, Wheeler, and Cobbett, Manchester.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Tuesday, March 17, 1891.

(Before JEUNE, J.)

LEWIN v. LEWIN. (a)

Husband and Wife — Conviction for aggravated assault under sect. 43—Fine 2l. and costs—Order for separation and allowance—Appeal—Matrimonial Causes Act, 1878 (41 Vict. c. 19), s. 4—24 & 25 Vict. c. 100, ss. 42, 43.

In an appeal to the Probate, Divorce, and Admiralty Division against an order of justices made under 41 Vict. c. 19, s. 4, granting a wife separation from her husband and an allowance the power of the court is limited to the question whether the justices were right in coming to the conclusion that the future safety of the wife was in peril; and the court has no power to question in any way the conviction upon which such order was made, although upon such conviction the justices may have imposed a fine of less than 5l., and thereby prevented the husband from appealing against the conviction to the quarter sessions.

THIS was an appeal by Charles Sutton Lewin, of Wilby, in the county of Norfolk, from an order of justices under 41 Vict. c. 19, s. 4, following upon a conviction by the said justices under 24 & 25 Vict. c. 100, s. 43.

The facts of the case were these:

The appellant, Charles Sutton Lewin, is a farmer, occupying

(a) Reported by H. DURLEY-GRAKERBROOK, Esq., Barrister-at-Law.

about 1000 acres of land at Wilby, in the county of Norfolk, in addition to having an interest in two other farms of some 300 acres each. He is forty-eight years of age, and in June, 1890 was a widower with six children, three of whom were living at home, the eldest of these three being a daughter aged about nineteen. Mr. Lewin, in June, 1890, engaged Rosetta Kirby, spinster, to assist his daughter in the management of the house and to act as companion to her. The age of Miss Kirby was about forty. Mr. Lewin shortly afterwards offered her marriage. She accepted him, and left the house about the 2nd day of August, and returned to her father's. From there she was married to Mr. Lewin, on the 5th day of August, 1890, at St. Stephen's Church, Norwich. They then went to Scarborough, and returned to Mr. Lewin's house on the 9th day of August.

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Disagreements soon after arose between them, the husband alleging, as the cause, that his wife mismanaged the household affairs, while the wife stated the cause to be that her husband gave way to drink.

On the 1st day of Feb. 1891, the husband got up, leaving his wife, who was unwell, still in bed. Later in the morning he went back to the bedroom, the servant following him. His wife was still in bed. He had a kitchen carving knife and fork in his hand. He asked his wife whether it was correct, when she engaged servants, that she engaged them to clean only the dining room knives and forks. She said it was perfectly true. He called his wife a foul name, and said that when she engaged servants it was for them to do everything. The girl turned to leave the room. Lewin went after her a few steps and then came back into the room, the girl following him. There was a small table by the bedside. He leaned over the table and flourished the knife and fork about in front of his wife's face, and said he would "do for her" if she engaged such servants. He was near enough to have struck her. He called his wife a big lazy —, and said, "You may go to hell; women are no use to me unless they work." His wife jumped out of bed, went to the window, lifted up the sash, and said that if he dared to come near her she would jump down. She believed he would have done her some mischief. He said "I will not come near you," and left the room. The servant then assisted her mistress to put some clothes on. The wife further stated that her husband was the worse for drink; that during the day she heard him threatening to do for her if he got hold of her, and that she went into another bedroom and got under the bed, where she remained about an hour. The husband came in while she was there, but did not see her. He was searching for her, and said he would do for her that night. She eventually left the house about six or seven o'clock, while her husband and his children were at tea.

The following day, the 2nd day of February, the wife applied to a magistrate, who took her depositions, and granted three

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summonses—1, for a common assault on the 18th day of January, 1891; 2, for threatening to “do for her,” having at the time a carving knife in his hand; 3, for assaulting her on the 1st day of February, 1891, contrary to 24 & 25 Vict. c. 100, s. 43; and she also gave notice that, in the event of a conviction, she should apply for a judicial separation and allowance, under 41 Vict. c. 19, s. 4.

On the 16th day of February, 1891, Charles Sutton Lewin appeared before justices for the county of Norfolk, sitting at East Harling in the said county, and thereupon it was adjudged “that the defendant, for that he, on the 1st day of February, 1891, did unlawfully assault his wife, Rosetta Lewin, contrary to the statute 24 & 25 Vict. c. 100, s. 43, for his said offence do forfeit and pay the sum of 2*l.* penalty, and do also pay the further sum of 9*l.* 4*s.* for costs forthwith,” and that, in default of payment, he should be “imprisoned for one month.”

At the same time and place the said justices made an order which, after reciting that the said Charles Sutton Lewin was convicted of “an aggravated assault within the meaning of the statute 24 & 25 Vict. c. 100, s. 43, upon Rosetta Lewin, his wife, and it appearing to the court that the future safety of the said Rosetta Lewin is in peril . . .” ordered that she be no longer bound to cohabit with him, and that he make her a weekly allowance of 30*s.*, such sum being considered by the justices to be fair, having regard to his and her means.

It had been previously agreed that the summonses 2 and 3 should be heard together, and they were so heard. The husband was represented by Mr Linay, solicitor, who cross-examined the witnesses and addressed the bench, but called no evidence.

On the 2nd day of March, 1891, notice of motion was given on behalf of the said Charles Sutton Lewin, that this Division would be moved, that the said order for judicial separation and payment of a weekly allowance be set aside or varied on the following amongst other grounds:

(1) That the said conviction and order are bad on the face thereof. (2) That the evidence adduced by the respondent and the witnesses called on her behalf did not, in law, establish the charge of assault under 24 & 25 Vict. c. 100, s. 43. (3) That the appellant was greatly provoked by the respondent and much excited. (4) That the appellant was convicted and fined for the alleged offence in respect of which the order of the 16th day of February, 1871, was made, and was also bound over to keep the peace in respect of the same alleged assault and the threats then made. (5) That the amount of alimony is excessive, and that the order to pay same was made without evidence of the means of the appellant.

And notice was given to read an affidavit filed by the said Charles Sutton Lewin and the exhibits thereto.

Poyser, for the husband, in support of the appeal, proposed to read an affidavit filed by his client.

Horace Browne, for the wife, objected, and submitted that no affidavit could be used. He cited *Re Powell*; *Powell v. Powell* (61 L. T. Rep. N. S. 486; 14 P. Div. 177).

JEUNE, J.—I do not think we can have anything as to the merits.

Poyser read such portion of the affidavit as did not deal with the merits; and contended that, as at the hearing of the summonses, the evidence of the wife was taken, and was corroborated in material particulars by the servant and by a charwoman employed in the house of the parties at the time of the assault the charge of aggravated assault was not made out, and therefore the justices had no jurisdiction to make the order appealed against. [JEUNE, J.—You say this order was wrong, because there was, before the justices, no evidence of an aggravated assault, there is no appeal here from the conviction for assault, however; the only appeal here is from the order for separation and allowance made thereon.] It is submitted that there is only one “proceeding” before the justices: (*Powell v. Powell (ubi sup.)*); and that the appellant is clearly entitled to have the evidence taken before the justices read. [The evidence was then read.] Sect. 42 of 24 & 25 Vict. c. 100, deals with the question of common assault. This is an assault which *prima facie* might come within that section, and might be satisfied with imprisonment for six months with hard labour. If the justices think that the penalties under sect. 42 are inadequate, they can, under sect. 43, give an increased punishment, amounting to double the fine and practically double the imprisonment. The conviction under sect. 43 must be taken to mean that the punishment imposable under sect. 42 was inadequate to the crime. The Matrimonial Causes Act, 1878, refers to the husband being “convicted summarily of an aggravated assault, or otherwise, within the meaning of the statute.” [JEUNE, J.—An aggravated assault may imply such future peril to the wife as is spoken of in the Act, or it may not. Whether it does or not may be open to appeal; but that is quite a different matter to appealing against the conviction itself.] This Court must see whether the conviction is “within the meaning of the statute”: (*Woods v. Woods*, 10 P. Div. 172.) The meaning of the Act is not that the justices should start with the advisability of having a judicial separation, and then searching for an aggravated assault to support such an order. If the mere recital in the order is to be deemed conclusive, then *Woods v. Woods (ubi sup.)* is sufficient authority to settle all appeals that could ever be brought under this section of the Act. [JEUNE, J.—Supposing magistrates convicted a man of an aggravated assault, and fined him 1*l.*, would that be a good order or not?] It would not be a good order, to find him guilty of an aggravated assault. If the magistrates simply fined the man less than 5*l.*, that must be a bad conviction. The nature of the assault, in the present case, involves two questions: (1) the peril to the wife; (2) the aggravated assault.

Horace Browns objected that, the recital in the order being sufficient and conclusive, the appellant was not entitled to go behind the order.

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Poyser.—It is submitted that there has never been a case under the Act. [JEUNE, J.—At present I am bound to say that the decision of Butt, J. carries us further than you allow. It carries us so far as this, that, although fined less than 5*l.*, still the conviction for aggravated assault was good. Then, it cannot be questioned in this Court, and we therefore start with this, that there is a good conviction of this man for an aggravated assault. If the justices had jurisdiction, and if they were dealing with the subject-matter of that jurisdiction, then their conviction cannot be challenged in this court. I think it follows from *Woods v. Woods* (*ubi sup.*) that you cannot get round it by saying that you would have had an appeal but for the justices finding that what had taken place did amount to an aggravated assault within the meaning of sect. 43.] The parties were married in August, 1890. The husband was drunk, went upstairs to his wife's room with a knife and fork, which did not happen to have been cleaned when he thought they ought to have been cleaned. He leant over the table near the bed, flourished the knife and fork about in front of her face, and threatened to "do for her." There was not even an assault. In order to constitute an assault, there must be an intention to assault. He was quite able to strike his wife, and although not restrained by anyone, he did not, in fact, strike her in any way. There was therefore no future peril to the woman.

Horace Browne for the wife pointed out that she jumped out of bed and ran to the window, and lifted up the sash and said she would jump out if her husband came near to her; and that though he said he would not go near her she afterwards heard him during the day threatening to "do for her" if he caught her, and she went and got under the bed in another room, and eventually fled from the house only partially dressed. Under these circumstances his Lordship was asked, sitting as a judge of this division of the High Court, to say that the magistrates were wrong in holding that the future safety of the wife was in peril. The only question for the Court was whether there was evidence upon which the justices could find that the wife's future safety was, or was not, in peril; and he submitted that there was.

JEUNE, J.—The only question I have to decide in this case is, whether the magistrates had a right upon the evidence to come to the conclusion that the future safety of the wife was in peril. It is suggested that there is a larger and more difficult question, namely, whether the conviction for an aggravated assault can or can not, in this particular case, be sustained. I do not think I have any right to enter into that question. In my view, the Act of Parliament (41 Vict. c. 19), which gives an appeal to this tribunal from all orders under the particular section which has been specially referred to, means exactly that which it is contended that it does. It gives an appeal to this tribunal from just so much of the magistrates' jurisdiction or power as the Act of Parlia-

ment conferred upon them. It is, however, suggested that there might be given, for a special reason, an appeal from that question, whether there was a proper conviction for an aggravated assault, and it can hardly be seriously contended that I am not bound by the two cases of *Woods v. Woods* (10 P. Div. 172) and *Re Powell*; *Powell v. Powell* (61 L. T. Rep. N. S. 486; 14 P. Div. 177). If those cases be taken as rightly decided, they appear to me to cover all the ground in this case, except the question as to the impropriety of the finding as to the wife's future safety being in peril. The conviction must, I think, be taken to be good, although it does not show, on the face of it, that the magistrates inflicted a fine such as they could have imposed, and, perhaps, were intended to inflict, in the case of a conviction under sect. 43. The point is decided by the two cases I have just alluded to. That being so, it appears to me that the conviction before the magistrates for an aggravated assault must be taken to be a good conviction. Then it is said that, although the decision in those two cases may be correct, still there ought to be, as it is urged that there is, an appeal from that conviction, because, inasmuch as, if the magistrates had fined the husband the full amount of the penalty under sect. 43 he would have had an appeal to quarter sessions against that decision, and inasmuch as in those two cases they abstained from fining the husband in the full penalty because they thought they were excused from fining him so much, that therefore there is an appeal to this court, as a substitute for the appeal to quarter sessions. All that is very good reasoning to show that there ought to be an appeal; but it does not appear to me to go any way towards showing that there is actually any appeal under the Act. If there does exist any such hardship as that which has been pointed out, it is only so to a limited extent, because the Act of 1878 appears to confer the right of appeal against anything the justices could have done under that Act, over and above what they could have done under the former statute. Now, assuming a good conviction for aggravated assault—and that we have a right to look at the evidence to see upon what the justices based their finding—an examination of that evidence convinces me that they arrived at a very sensible conclusion. But I do not know that I need go as far as that, because the justices had means of seeing and hearing the witnesses, which I have not the advantage of here. The magistrates had the woman before them, and, from her language and demeanour, they were admirably qualified to come to a right conclusion whether her story was the true one, and whether her future safety was in peril; and upon the evidence, I think I should have been extremely likely to have come to the same conclusion. The woman had a knife flourished over her head, she was frightened, she ran to the window, threw up the casement, and threatened to jump out. She heard her husband using threats of what he would do if he got hold of her; she, in terror, hid under the bed in another room, and eventually,

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after some hours, left the house unknown to her husband. On this evidence, therefore, it is impossible for me to say that the magistrates were not fully justified in the conclusion to which they came, that this woman's future safety was endangered. I must therefore dismiss this appeal with costs.

Poyser asked for leave to appeal in case the same were necessary.

JEUNE, J.—These are very proper questions to be raised, and I will give any leave that may be necessary.

Appeal dismissed, leave to appeal granted.

Solicitors for the appellant (the husband), *Storey and Cowland*, agents for *Samuel Linay and Co.*, Norwich; for the respondent (the wife), *F. A. K. Doyle*, agent for *Chittock and Woods*, Norwich.

QUEEN'S BENCH DIVISION.

Thursday, April 23, 1891.

(Before DAY and LAWRENCE, JJ.)

KENNEDY v. COWIE. (a)

Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), ss. 7-16—Charge of intimidation—Exception in respect of seamen.

Sect. 16 of the Conspiracy and Protection of Property Act, 1875 which provides that nothing in the Act shall apply to seamen, does not exempt a person who is not a seaman from being charged with, and being liable to punishment under the Act for, an offence committed by him against a seaman.

THIS was a special case stated by the justices of South Shields. The appellant, who was a seaman, swore an information and obtained a summons against the respondent, under the Conspiracy and Protection of Property Act, 1875, s. 7, for intimidation. The respondent, a delegate of the Seamen's and Firemen's Union, which has a branch at South Shields, when before the magistrates, elected to be tried by a jury, but, before the proceedings terminated, he took the objection that, as the appellant was a seaman, the case was taken out of the above-mentioned statute by sect. 16 thereof, which provides that "nothing in this Act shall apply to seamen, or to apprentices to

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

the sea service." The Justices allowed the objection, and dismissed the case.

Forrest Fulton for the appellant.—The appellant, the person intimidated, was certainly a seaman, but the person intimidating was not a seaman; the exemption contained in sect. 16 only applies when both parties are seamen; or, at any rate, when the person intimidating is a seaman. The respondent, being a landsman, could not be made liable under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104); and, if the justices are right, a man who intimidates seamen cannot be punished at all.

Lawson Walton, Q.C. and *R. Neville* for the respondent.—A seaman is excluded in terms from seeking the protection of the Act. Sect. 16 directs the word "seaman" to be substituted for "person" wherever it occurs, and in all those cases the Act is to have no application. It was never intended that the Act should apply to offences against seamen, and its object is for the protection of workmen. Neither the Act of 6 Geo. 4, c. 129, nor that of 34 & 35 Vict. c. 32, which was the predecessor of the present Act, had any application to seamen. In this Act the neutral word "person" is introduced instead of "workman," and sect. 16 is put in for the express purpose of excluding seamen from its operation and its protection. Their protection under the Merchant Shipping Act 1854, ss. 243, 257, is far greater than it would be under this Act. Special machinery being applicable to this case, the general law does not apply. See *Great Northern Steamship Fishing Company v. Edgehill* (11 Q. B. Div. 225).

Day, J.—I think the justices have misconstrued the plain language of the Act of 1875. The respondent would undoubtedly be liable in respect of the offence committed by him, and might be properly convicted but for the exempting clause. Does that clause apply to the present case? I think it does not. To whom then does it apply? The Act is for the punishment of offenders, persons who do certain wrongful acts, and the exemption means, "Nothing shall make a seaman liable to the punishments attached to offences under this Act." If the respondent had been a seaman he might have claimed the exemption, but being a landsman he cannot say that he is entitled by sect. 16 to commit the offence of intimidation because the appellant is a seaman. It merely means, "no penalty shall fall on a seaman who does these things." But the respondent is not a seaman, and the Act therefore is applicable to him.

LAWRANCE, J. concurred.

Case remitted to the justices.

Solicitors for the appellants, *Botterell, Roche, and Temperley*, London and Newcastle-on-Tyne.

Solicitor for the respondent, *Arthur A. Nowell*, for *Jacks*, South Shields.

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QUEEN'S BENCH DIVISION.

Friday, April 24, 1891.

(Before DAY and LAWRENCE, JJ.)

FECITT (app.) v. WALSH (resp.). (a)

Adulteration of food—Contract to supply milk containing specified proportion of cream—Deficiency of cream in the milk supplied—Information laid by inspector of weights and measures against consignor—Conviction of consignor by justices—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 9—Sale of Food and Drugs Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 3.

Under a contract with the guardians of the West Derby Union the appellant undertook to supply them with a specified quantity of milk daily at a certain price, and the milk was to be tested upon delivery, and a reduction in the price was to be made if it appeared that the milk was deficient in a certain specified proportion of cream.

On the 28th day of October, 1890, the appellant delivered five cans of milk at the workhouse, from each of which a sample was taken by the respondent, an inspector of weights and measures. Two of these samples having been found, on analysis, to be deficient in cream, the appellant was summoned, convicted, and fined.

Held (affirming the decision of the justices), (1) that the respondent, the inspector of weights and measures, was justified in laying two informations, notwithstanding there was, as between the appellant and the guardians of the union, only one sale; (2) that the respondent was right in taking a sample from each of the five different cans; (3) that the appellant was not entitled to give in evidence the analysis of the milk contained in the three cans in respect of which no information had been laid; and (4) that his contract with the guardians of the West Derby Union could not affect his liability on informations laid by an inspector of weights and measures.

THIS was a special case, stated under the provisions of 20 & 21 Vict. c. 43. The appellant, James Fecitt, was a purveyor of milk, and had entered into a contract with the guardians of the West Derby Union for the supply of milk to the workhouse of the union. By this contract he undertook to deliver daily to the union workhouse, at the price of 8d. per gallon, "new milk, free from adulteration, yielding seven degrees

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

of cream ;" and it was provided by the contract that a penny per gallon should be deducted from the price for every degree less than six. The daily supply amounted to about seventy gallons, and on the 28th day of October, 1890, it was delivered at the workhouse in five cans.

The respondent, Samuel Walsh, who was an inspector of weights and measures, procured samples from the five different cans and had them analysed. In one case half the cream, and in another more than a third, was found to have been abstracted, and on the 22nd day of November, 1890, the respondent laid two informations against the appellant. The charge in each case was, that the appellant was the consignor of certain milk, and that the respondent was an inspector of weights and measures and had procured, at the place of delivery, a sample of the milk in course of delivery, and had submitted it to analysis, and that, in respect of the sample, cream had been abstracted, with intent that the milk should be sold in its altered state without notice. It was proved in evidence that the average amount of cream in unadulterated new milk was ten degrees, that the authorities at the workhouse were possessed of the necessary instruments for testing the milk delivered to them, and that they habitually tested it. If all the cans had been taken together the amount of cream would have been about six degrees.

The magistrates convicted the appellant, fining him 10*l.* in each case, and ordering him to pay the costs of the proceedings and the analyst's fee, subject to the present case, in which four questions were left for the consideration of the court, namely : (1.) Whether, under the circumstances, more than one information could be laid against the appellant. (2.) Whether separate samples, or one sample only of the whole bulk, should have been taken. (3.) Whether the appellant was entitled to give evidence in reference to the samples of milk, so taken as aforesaid, not the subject of either of the said informations. (4.) Whether, having regard to the said contract, there was any offence within sect. 9 of the Sale of Food and Drugs Act, 1875.

Sect. 9 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), is as follows :

No person shall, with intent that the same may be sold in its altered state, without notice, abstract from an article of food any part of it so as to affect injuriously its quality, substance, and nature, and no person shall sell any article so altered without making disclosure of the alteration, under a penalty in each case not exceeding twenty pounds.

By sect. 3 of the amending Act of 1879 (42 & 43 Vict. c. 30)

Any medical officer of health, inspector of nuisances, or inspector of weights and measures, or any inspector of a market, or any police constable under the direction and at the cost of the local authority appointing such officer, inspector, or constable, or charged with the execution of this Act, may procure, at the place of delivery, any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale to such purchaser or consignee of such milk ; and such officer, inspector, or constable, if he suspect the same to have been sold contrary to any of the provisions of the principal Act, shall submit the same to be analysed, and the

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quality—
Deficiency of
cream—Infor-
mation by
inspector of
weights and
measures—
Conviction of
consignor—
Sale of Food
and Drugs
Acts, 1875
and 1879.

same shall be analysed, and proceedings shall be taken and penalties on conviction be enforced, in like manner in all respects as if such officer, inspector, or constable had purchased the same from the seller or consignor under section thirteen of the principal Act.

T. S. Little for the appellant.—There is no evidence that the appellant had abstracted cream from either of the samples, and no allegation that he had abstracted it. He is neither charged with abstracting, under the first part of sect. 9 of the Act of 1875, nor with selling, under the second part. There was but one sale and one delivery to the guardians of the West Derby Union, and one sample ought to have been taken of the whole, and it would have shown the requisite amount of cream. The guardians had arranged for deficiency in cream, and had notice of the condition of the milk.

Poland, Q.C. and W. H. Cross for the respondent.—By the amending Act of 1879 the officer who takes possession is made as if he had purchased from the consignor within the principal Act of 1875. The inspector becomes the purchaser, and the charge is established on proof of abstraction and delivery without disclosure. There are two separate abstractions and different quantities are removed in the two cases, two offences are therefore committed. The appellant is the seller, there is a separate sale with each can, and it is not necessary, in order to convict him, to show his guilty knowledge of the abstraction: (*Betts v. Armstead*, 16 Cox C. C. 418; 58 L. T. Rep. N. S. 811; 57 L. J. 100, M. C.; *Pain v. Boughtwood*, 16 Cox C. C. 747; 62 L. T. Rep. N. S. 359; 59 L. J. 45, M. C.) Even if a sample had been taken of the bulk the amount of cream would still have been deficient.

T. S. Little in reply.

DAY, J.—The answer to the first question depends upon the facts stated. The milk was delivered to the union as part of a large contract running over a considerable period, the day's delivery being for convenience effected in five cans. I am of opinion that there was here only one sale; the appellant was to supply a daily quantity, and each day's transaction was one sale; as between the appellant and the union there is only one sale, and if the union had laid the information only one information would have lain. But it appears that, acting under the Act of 1875, and the subsequent amending Act of 1879, the police constable procured several samples, and in each case of procurement he acted as purchaser, and in each of the five acts he must be taken to be the purchaser and the appellant the seller. He procured the several samples in the course of delivery to the consignee, and the proceedings must be "in like manner in all respects as if he had purchased the same from the seller or consignor under the Act of 1875." Here, as far as the officer is concerned, there are five separate transactions, and in respect of each of them he might have proceeded; by procuring them as he has done, he is deemed to be the purchaser in each particular case, and each is a

separate transaction, and five different informations will lie. He only proceeds, however, in respect of two of them, and the appellant is convicted. They are different sales in respect of which different penalties are recovered, and therefore the police constable was justified in laying two informations. The second question appears to be asked on the assumption that the contract of the board of guardians might affect the decision; but it has no bearing whatever on the proceedings in the court below, and the officer was justified in procuring a separate sample from each can and testing each sample separately as he did. Each can represents a separate lot of milk, and he need not mix up one sample with another, or with the bulk. With regard to the third question, the other three samples had nothing to do with the case. It may, however, be some comfort to the appellant to know that, though wanting in cream, they were not so bad as the two on which proceedings have been taken. As to the fourth question, as I said before, the case has nothing whatever to do with the contract between the vendor and the union.

LAWBANCE, J. concurred.

Conviction affirmed.

Solicitor for the appellant, *Wm. Rudd*, Liverpool.

Solicitors for the respondent, *Ridsdale and Son*, for *F. C. Hulton*, Preston.

FROITT
v.
WALSH.
1891.

Adulteration of food—Contract to supply milk of specified quality—Deficiency of cream—Information by inspector of weights and measures—Conviction of consignor—Sale of Food and Drugs Acts, 1875 and 1879.

NORTHERN CIRCUIT.

LIVERPOOL SUMMER ASSIZES.

July 31, 1890.

(Before WILLIAMS, J.)

REG. v. FRIEL. (a)

Practice—Plea of autrefois convict—Manslaughter—Summary conviction for assault—42 & 43 Vict. c. 49, s. 27, sub-sect. 3 (Summary Jurisdiction Act, 1879).

Where there has been a summary conviction under the Summary Jurisdiction Act, 1879, for assault, and the person assaulted subsequently dies of injuries caused by the acts constituting the assault, a plea of autrefois convict is not a good answer by the person so summarily convicted to an indictment for the manslaughter of the person assaulted.

(a) Reported by H. STEPHEN, Esq., Barrister-at-Law.

REG.
v.
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1891.

The death of the deceased person is one of the facts constituting the cause for a prosecution for manslaughter.

Reg v. Morris (16 L. T. Rep. N. S. 636; L. Rep. 1 C. C. R. 90; 36 L. J. 89, M. C.) followed.

Practice—
Plea of
autrefois
convict—
Manslaughter
— Summary
conviction
for assault—
42 & 43 Vict.
c. 49, s. 27 (3).

MARY FRIEL was indicted for the manslaughter of William Carr.

The prisoner had been summarily convicted under the Summary Jurisdiction Act, 1879, of assault upon Carr, who had subsequently died of injuries resulting from the assault. A plea of *autrefois convict* was pleaded, setting out the fact of the prisoner's conviction for assault, and alleging that the acts constituting the alleged felonious killing were the acts which constituted the assault.

The Summary Jurisdiction Act, 1879, provides as follows (42 & 43 Vict. c. 49, s. 27, sub-sect. 3) :

Where an indictable offence is under the circumstances in this Act mentioned authorised to be dealt with summarily,—

(3.) The conviction for any such offence shall be of the same effect as a conviction for the offence on indictment. . . .

H. H. Swift appeared in support of the prosecution.

A. Cummins appeared in support of the plea.

WILLIAMS, J. gave judgment for the Crown.

The prisoner, having also pleaded "not guilty," was tried and convicted.

Cummins thereupon applied to the learned judge to state a case for the Court for Crown Cases Reserved on the ground that he ought to have allowed the plea of *autrefois convict*.

WILLIAMS, J., having taken time to consider the application, delivered the following written judgment, refusing to reserve a case:—I do not think I ought to state a case. The defendant has pleaded in bar a special plea of *autrefois convict*, relying on a conviction for assault before justices under the Summary Jurisdiction Act, 1879, and relies upon the provision contained in sub-sect. 3 of sect. 27 of that Act, which enacts that a conviction for an offence under that Act shall be of the same effect as a conviction for the offence on indictment. Thereupon counsel for the prosecution, although he did not dispute that the manslaughter charged in the indictment was based on the same facts as those which constituted the offence dealt with under the Summary Jurisdiction Act, objected that the plea was bad in law. After argument I thought that such a plea was no answer in law to an indictment for manslaughter, and so determined, and thereupon proceeded to hear the facts of the case on the plea of not guilty pleaded by the defendant, stating, however, that, if on consideration I should think it right to do so, I would reserve the point raised on the pleadings for the consideration of the Court for Crown Cases Reserved. The jury have found the defendant guilty. I have looked at the authorities, and I think that it is plain on the authorities that a conviction or acquittal on

an indictment for an assault cannot be pleaded in bar to a subsequent indictment for murder or manslaughter. This proposition is expressly laid down by Byles, J. in delivering the judgment of himself and Keating, J. in *Reg. v. Morris* (1 L. Rep. C. C. R. 90). It is true that Kelly, C.B. dissented, and is true that in that case the question to be decided was the construction and effect of 24 & 25 Vict. c. 100, ss. 44-45, and was not the question of the effect of a previous conviction on an indictment, but the decision has, I believe, always been recognised as a decision on the common law question, and is so treated by Hawkins, J. in the recent case of *Reg. v. Miles* (*ante*, p. 9; 62 L. T. Rep. N. S. 562; 24 Q. B. Div. 423), where he says it would hardly be contended that a previous conviction for a common assault could be pleaded in bar to an indictment for murder, though to prove the murder it might be essential to prove the assault adjudicated upon. For the offence of murder consists in the felonious killing. So also of manslaughter: (see *Reg. v. Morris*.) This seems in accordance with principle. The indictment for manslaughter is not a charge in a new form based on the facts supporting the former charge, nor is it the former charge with the addition of matters of aggravation or of newly alleged consequences. It is a charge based on new facts; and the circumstance that some of those facts have been made the basis of a former charge of a different class is immaterial. The difference is not of degree merely. The characteristic new fact here is the death. That death is a new fact, and not a mere matter of aggravation or a mere consequence, is plain from the consideration that in cases of manslaughter, where the charge is based on death resulting from culpable negligence, there is no criminal offence unless death ensues and gives rise to a charge of manslaughter. I wish to add that this view of the law that a prior conviction for assault cannot be effectively pleaded in bar to a subsequent indictment for murder or manslaughter, is confirmed by the great authority of Stephen, J. in his book on Criminal Law Procedure, p. 173, who, though in terms he does not mention manslaughter, yet lays down the principle, and gives indictment for murder after a previous conviction for unlawful wounding as an illustration, and no reason has been suggested to me, or I believe could be suggested, why the doctrine thus illustrated should not include manslaughter as much as murder.

Application to reserve case refused.

REG.
v.
FRIEL.
—
1891.

Practice—
Plen of
autrefois
convict—
Manslaughter
— Summary
conviction
for assault—
42 & 43 Vict.
c. 49, s. 27 (3).

QUEEN'S BENCH DIVISION.

Tuesday, June 23, 1891.

(Before CAVE and CHARLES, JJ.)

KEARLEY AND ANOTHER v. TYLOR. (a)

Adulteration of food—Admissibility of evidence as to the article sold being inclosed by mistake in a wrong wrapper—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6.

E. W., in the employment of and at the request of the respondent, entered a shop belonging to the appellants and asked for some lard. He was served with it by the shop assistant, and then handed it to the respondent, who informed the shop assistant that it was bought for the purpose of analysis. The assistant then noticed that he had inclosed the lard in a wrapper labelled "margarine," and pointed out the mistake. A summons was taken out under sect. 6 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), and on the hearing of the charge evidence was called and tendered on behalf of the appellants that in the hurry of the business and by mistake, their assistant had put the lard in a wrapper marked "margarine" instead of "lard compound," and that such an act was contrary to the express instructions of the appellants. The justices refused to admit such evidence, and convicted and fined the appellants.

Held, that the conviction must be quashed, for the evidence tendered and refused was admissible and material.

CASE stated by the justices for the county of Middlesex, under 20 & 21 Vict. c. 43, pursuant to an order of the High Court. The facts of the case as therein stated are shortly as follows :

On the 22nd day of September, 1890, an information was preferred by one Walter Tylor, the respondent, an inspector of weights and measures, before the justices sitting at Staines, under sect. 6 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), against Kearley and Tonge, the appellants, "for that they, on the 16th day of August, 1890, at Staines, did unlawfully sell to the respondent, to his prejudice, a certain article of food, to wit, half a pound of lard, which was not of the nature, substance, and quality of the article demanded, such lard being adulterated with 30 per cent. of foreign fat or oil, contrary to sect. 6 of the Sale of Foods and Drugs Act, 1875 (38 & 39 Vict. c. 63)." The appellants were duly convicted and fined ten shillings and sixpence and costs.

(a) Reported by ALFRED H. LEFROY, Esq., Barrister-at-Law.

Upon the hearing of the said information it was proved on the part of the respondent and found as a fact that, on the 16th day of August, 1890, one Edward Watkins, an assistant in the employment of the respondent, entered the shop of the appellants at Staines, and asked for "half a pound of lard," and that he was served by one Mark Hellis, the person in charge of the shop; and that he (Watkins) took the lard to the shop door and handed it to the respondent, the lard being inclosed in a wrapper marked and labelled "margarine." That when the lard was handed by Watkins to the respondent, the latter at once entered the shop and told Hellis that the article had been purchased for the purpose of being analysed by the public analyst, and that if he (Hellis) wished he would divide it into three portions; whereupon Hellis replied, "Yes, I want a piece," and a portion was handed to him. That whilst the respondent was in the act of wrapping up the lard, Hellis said, "There has been a mistake here, I have put the wrong wrapper round it—Will you notice it?" and that the respondent answered, "I will make a note of it." That before the respondent left the shop, Hellis produced and showed him a wrapper on which was printed, "lard compound." That a portion of the lard purchased was subsequently forwarded to the public analyst, and certified by him to contain 30 per cent of foreign fat or oil.

Mark Hellis was called as a witness for the defence, and deposed that he was the manager of the shop for the appellants, whose head office is in London; that at the time of the sale in question there were at least twenty people in the shop waiting to be served; that he was supplied by the appellants with four sorts of wrappers which hung in separate bundles behind him at the counter, and that, in the hurry of business and by mistake, he had put the said half pound of lard in a wrapper labelled "margarine" instead of in a wrapper marked and labelled "refined lard compound," and that the said last-mentioned wrappers and the said margarine wrappers were hanging close together.

On behalf of the appellants it was proposed to put questions to the said Hellis, with a view to proving that the sale of the said lard, in anything but a wrapper similar to that marked "refined lard compound," was contrary to the express instructions of the appellants, his masters, and in breach of his duty, and was not authorised by the appellants; and evidence was tendered for the purpose of showing that such sale was, under the circumstances not authorised by the appellants, and was contrary to their express instructions.

The Bench declined to allow such questions to be put, or to admit such evidence, and convicted the appellants of the said offence.

The appellants being dissatisfied, asked to have a case stated for the opinion of the High Court, but the justices being of opinion that the application was frivolous, refused to state such case, whereupon the High Court granted a rule calling upon them to do so.

KEARLEY AND
ANOTHER
v.
TYLOR.
1891.

*Adulteration
of food—
Evidence—
Admissibility
of evidence as
to mistake—
Use of wrong
wrapper—
38 & 39 Vict.
c. 63, s. 6.*

KEARLEY AND
ANOTHER
v.
TYLOR.
—
1891.

The questions for the opinion of the Court were: 1. Whether the Bench acted rightly in so convicting the appellants under the circumstances? 2. Whether such evidence as was tendered on behalf of the appellants would, under the circumstances, have afforded any defence to the said complaint as made against them?

Adulteration
of food—

Evidence—

Admissibility
of evidence as
to mistake—

Use of wrong
wrapper—

38 & 39 Vict.
c. 63, s. 6.

Sect. 6 of 38 & 39 Vict. c. 63, is in part as follows:

No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds. . . .

Sect. 8 says:

Provided that no person shall be guilty of any such offence as aforesaid in respect of the sale of an article of food or a drug mixed with any matter or ingredient not injurious to health, and not intended fraudulently to increase its bulk, weight, or measure, or conceal its inferior quality, if at the time of delivering such article or drug he shall supply to the person receiving the same a notice by a label distinctly and legibly written or printed on, or with the article or drug, to the effect that the same is mixed.

Horace Ivory for the appellants.—The only question here is whether the magistrates ought to have received evidence that the act of the servant was directly contrary to the orders of the master, and that the act complained of was done through a mistake. The defence is open to the vendor that he has given notice at the time of the purchase that the article is mixed, or that it has been put into a labelled wrapper. There must be an express or implied authority to render the master liable for the acts of his servant: (*Budd v. Lucas*, 64 L. T. Rep. N. S. 292; (1891) 1 Q. B. 408; *Newman v. Jones*, 17 Q. B. Div. 132.) Evidence was offered that the mistake of the servant was a *bonâ fide* act. The evidence was clearly admissible: (*Chisholm v. Doulton*, 60 L. T. Rep. N. S. 966; 22 Q. B. Div. 736.)

The respondent was not represented.

CAVE, J.—This conviction must be quashed. The appellants were summoned under sect. 6 of 38 & 39 Vict. c. 63, and when before the magistrates they proposed to tender evidence that the act complained of on the part of their servant had been done by him contrary to their express orders. This evidence was in my opinion admissible and material, and the magistrates were clearly wrong in refusing to admit it. It must depend upon the circumstances of each individual case if the magistrates are to act on such evidence, but it must at any rate be admitted.

CHARLES, J.—I am of the same opinion. Evidence was offered to show that the shop assistant was acting in disobedience to the orders of his masters, and this is clearly admissible. There is nothing in the Sale of Food and Drugs Act, 1875, which prevents the applicability of the ordinary law as regards the criminal liability of a master for his servant to cases under that Act.

Solicitors for the appellants, *Wilkinson, Howlett, and Wilkin-*
son.

QUEEN'S BENCH DIVISION.

Tuesday, June 23, 1891.

(Before CAVE and CHARLES, JJ.)

COPELAND v. WALKER. (a)

Bread—Sale otherwise than by weight—Conviction—6 & 7 Will. 4, c. 37, ss. 4 and 7—The Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 32.

A customer was served with a loaf of bread by the appellant's son from a cart belonging to the appellant and of which the son was in charge. The loaf was not weighed at the time of sale thereof nor did the purchaser require that such should be done, but it was afterwards found to be of short weight. The appellant was convicted under sect. 4 of 6 & 7 Will. 5, c. 37, which provides that bread shall not be sold otherwise than by weight.

Held, that the conviction was right and that the Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), as affecting 6 & 7 Will. 4, c. 37, only applies to sect. 7 of that Act, and only to such part of such section as relates to a baker refusing to weigh bread purchased of him.

THIS was a case stated by the justices for the county of Worcester, and was brought before the Superior Court as a test case, the question raised being, whether sect. 32 of the Weights and Measures Act, 1889 (52 & 53 Vict. c. 21) did away with the necessity of selling bread by weight as directed in 6 & 7 Will. 4, c. 37.

Sect. 4 of that Act enacts, as regards bread sold outside the city of London and certain limits, that if any baker or seller of bread

Shall sell or cause to be sold bread in any other manner than by weight, then, and in such case, every such baker or seller of bread shall for every such offence forfeit and pay any sum not exceeding forty shillings, which the magistrate or magistrates, justice or justices before whom such offender or offenders shall be convicted shall order and direct: Provided always, that nothing in this Act contained, shall extend or be construed to extend to prevent or hinder any such baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread or rolls without previously weighing the same.

And sect. 7 of the same Act enacts:

That every baker or seller of bread beyond the limits aforesaid, and every journeyman, servant, or other person employed by such baker or seller of bread, who shall convey or carry out bread for sale in and from any cart or other carriage, shall be provided with and shall constantly carry in such cart or other carriage a correct beam and scales with proper weights. . . . And in case any such baker or seller

(a) Reported by ALFRED H. LEFROY, Esq., Barrister-at-Law.

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by weight—*

6 & 7 Will. 4, c. 21;
c. 37, ss. 4, 7;
52 & 53 Vict.
c. 21, s. 32.

of bread or his or her journeyman, servant, or other person . . . shall at any time refuse to weigh any bread purchased of him, her, or them, or delivered by him, her, or their journeyman, servant, or other person, in the presence of the person or persons purchasing or receiving the same, then and in every such case every such baker or seller of bread shall for every such offence forfeit and pay any sum not exceeding five pounds, which the magistrate or magistrates, justice or justices, before whom such offender or offenders shall be convicted shall order and direct.

Sect. 32 of the Weights and Measures Act, 1889 (52 & 53 Vict. c. 21) enacts as follows :

Nothing in the enactments referred to in the fourth schedule to this Act shall render any baker or seller of bread, or the journeyman, servant, or other person, employed by such baker or seller of bread, liable to any forfeiture or penalty for refusing to weigh in the presence of the purchaser any bread conveyed or carried out in any cart or other carriage, unless he is requested to do so by or on behalf of the purchaser.

The facts of the case are as follows : The appellant was a baker, and his son was in charge of his cart with bread therein for sale. A customer was served by him with a loaf, for which such customer paid, but he did not weigh the loaf nor did the customer request him to do so.

The loaf of bread was found to be of short weight.

The appellant, on an information preferred against him by the respondent, a police sergeant, was convicted under sect. 4 of 6 & 7 Will. 4, c. 37, at Kidderminster Petty Sessions, for, "that being a baker and seller of bread he did sell to one C. E. a certain loaf of bread otherwise than by weight, the said loaf not being such bread as is usually sold under the denomination of French or fancy bread or rolls." Upon the hearing of the information evidence was given on behalf of the appellant that it was his custom to have the dough, after being made up for baking, weighed for quartern or half-quartern loaves, and that in this case his son had some extra loaves with him to cut up to make weight should any of the loaves sold be found, on being weighed, to be of short weight.

The justices convicted the appellant, but stated a case for the opinion of the High Court.

R. E. Kettle appeared on behalf of the appellant and contended that the conviction was bad, inasmuch as the effect of sect. 32 of the Weights and Measures Act, 1889, was to do away with the necessity of weighing bread before sale in the case of bread sold from a cart unless a request was made by or on behalf of the purchaser that the bread should be weighed at the time of sale. There was no refusal to weigh the bread sold here, for the purchaser never requested such to be done, consequently there had been no offence committed here. Sect. 4 of the Act (6 & 7 Will. 4, c. 37) established the principle of bread being sold by weight, and sects. 6 and 7 enact how that principle is to be carried out. Counsel thought it only right to point out to the court that the following cases, *Jones v. Hustable*, 16 L. T. Rep. N. S. 381; 2 Q. B. Div. 460; *Reg. v. Kennett*, 20 L. T. Rep. N. S. 656; 4 Q. B. Div. 565; and *Hill v. Browning*, 22 L. T. Rep. N. S. 584; Q. B. Div. 453, all which cases were more or

less on all-fours with the present case, were against the appellant's contention, but these cases were decided prior to the passing of the Weights and Measures Act, 1889. Before that Act there would, it is true, have been no answer to this conviction, but that Act altered the law as established by the aforesaid cases, and did away with the necessity of selling bread by weight when it is sold from a cart, unless there should be a request by or on behalf of the purchaser to have the bread weighed. There had of late been several cases similar to the present one, which had been decided by magistrates in a contradictory manner, and it was desired to have the authoritative decision of this court.

The respondent was not represented.

CAVE, J.—I am of opinion that the conviction was good. The appellant was convicted and fined under sect. 4 of 6 & 7 Will. 4, c. 21, which enacts that bread shall not be sold otherwise than by weight, and provides a penalty for so doing. Sect. 7 of the same Act provides a heavier penalty in the case of a baker or seller of bread refusing to weigh bread in the presence of the purchaser. Then comes the Weights and Measures Act of 1889, sect. 32 of which says, that nothing in the enactments referred to in the fourth schedule to that Act shall render any baker liable to a penalty for refusing to weigh bread in the presence of the purchaser unless he is requested so to do by or on behalf of the purchaser. Thus one of the penalties imposed by sect. 7 of the older Act is taken away, provided there is no request by the purchaser to have the bread weighed. Sect. 32 of the Act of 1889 explains the law in the enactments referred to in the 4th schedule to that Act, and on turning to that schedule we find that sect. 7 is the only section of the Act 6 & 7 Will. 4, c. 37, to which the Act of 1889 applies. And I am of opinion that it only applies to such part of that section as relates to a baker refusing to weigh the bread he sells. The rest of sect. 7 and all the other sections are unaffected by the new Act.

CHARLES, J.—I am of the same opinion.

Conviction affirmed.

Solicitors for the appellant, *Sharpe, Parker, Pritchard*, and *Sharpe*, agents for *Ryland, Martineau, and Co.*, Birmingham.

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v.
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—
1891.

*Bread—Sale
otherwise than
by weight—
6 & 7 Will. 4,
c. 37, ss. 4, 7;
52 & 53 Vict.
c. 21, s. 32.*

CHANCERY DIVISION.

May 27, 28, 29, and June 1, 1891.

(Before WILLIAMS, J., sitting as an additional Judge of the Chancery Division.)

JONES v. MERIONETHSHIRE PERMANENT BENEFIT BUILDING SOCIETY. (a)

Compounding misdemeanour—Agreement not to sue for sums misappropriated—Validity of consideration—Stifling a prosecution.

C., the secretary of a building society, misappropriated various sums received by him as such secretary. Upon these frauds being brought to the knowledge of the directors they required him, under threats of criminal proceedings, to make good his defalcations by a specified day. C. then applied to the plaintiffs, who were his relatives, for assistance, and mentioned that he was in danger of being prosecuted. The plaintiffs thereupon signed a document addressed to the society which provided as follows:—
 “In consideration of your not suing C. to recover the sum of 626l., being the whole amount owing by him to you, we undertake to see you paid the sum of 526l.” The document went on to state that a portion of the money was to be paid in cash, and the balance secured by promissory notes. In pursuance of that undertaking the plaintiffs gave two promissory notes to the society. The plaintiffs would not have given this undertaking except for the purpose of saving C. from criminal proceedings, and this fact was known to the directors.

Held, that the consideration for the agreement, being the forbearance of the society to take criminal proceedings against C., was illegal, and that the agreement which was founded upon it was therefore void.

Held, therefore, that the promissory notes must be set aside.

Ward v. Lloyd (7 Scott N. R. 499; 7 Man. & G. 785) and Flower v. Sadler (10 Q. B. Div. 572) explained and distinguished.

THIS was an action for a declaration that two joint and several promissory notes signed by the plaintiffs in favour of the defendants, the Merionethshire Permanent Benefit Building Society, for 200l. and 150l. respectively, and a deposit of certain

(a) Reported by W. IVIMY COOK, Esq., Barrister-at-Law.

title deeds as a collateral security, were void, on the ground that they were given for an illegal consideration.

The circumstances under which these notes were given and the deposit was made were the following :—

John Cadwaladr was the secretary of the defendant society from the time of its incorporation in 1877 until March, 1889, and as such secretary it was a part of his duty to keep the accounts of the society.

Early in 1889 certain defalcations in the accounts of the society were brought to the notice of the directors, who thereupon caused a thorough examination to be made of the books of the society throughout the whole period of its existence. The result of this investigation showed that the total amount of these defalcations was 626*l.* 2*s.* The directors therefore suspended Cadwaladr from his office, and required him to make good the defalcations so found by a specified day. With a view to enable him to do this Cadwaladr applied to the plaintiffs, Thomas Elias Jones and Catherine Jones, who were respectively his brother-in-law and mother-in-law, for assistance, which they at first declined to render.

On the 4th day of April Cadwaladr's son wrote at his father's dictation a letter to the plaintiff, T. E. Jones, in which he mentioned that his father was in danger of being prosecuted. The plaintiffs thereupon undertook to pay to the defendants 176*l.* 2*s.* in cash, and to give to them two joint and several promissory notes for 200*l.* and 150*l.*, and also to deposit certain title deeds with the defendants as collateral security. This offer was accepted by the directors at a board meeting on the 6th day of April, at which the plaintiff, T. E. Jones, was present. At this meeting nothing was said by the directors as to their intention to prosecute Cadwaladr, and they did not in terms promise not to prosecute him. The transaction was completed on the evening of the same day, when a document was signed by the plaintiff, T. E. Jones, on behalf of himself and the plaintiff Catherine Jones, which had been prepared in the office of G. H. Ellis, the solicitor of the society, since the meeting in the afternoon. It was addressed to the society, and was in the following terms :—

In consideration of your not suing Mr. John Cadwaladr, of Blaenau Festiniog, chartered accountant, to recover the sum of 626*l.* 2*s.*, being the whole amount owing by him to you, we undertake to see you paid the sum of 576*l.* 2*s.* in the manner following, viz., in cash amounting to 176*l.* 2*s.* and the remainder to be secured by two promissory notes (one for 200*l.* and one for 150*l.*), and also interest thereon at the rate of 5 per cent. per annum, to be payable on demand and executed by us.

At the same time the money was paid, and the promissory notes and deeds were handed over to the defendants.

The defendants by their defence pleaded that the directors had no belief that their secretary had been guilty of fraud, and that they never threatened or intended to take criminal proceedings against him.

The facts found by the Court upon the evidence were as follows :—That Cadwaladr had embezzled the funds of the society ; that

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the directors recognised the defaults of Cadwaladr as defaults arising from his criminal use of their funds, and that they threatened to prosecute him; and that the threats uttered by the directors were communicated by Ellis to Cadwaladr's son, and also to his sister-in-law, one Mrs. Williams; and that the directors had no communications whatever with the plaintiffs in which they mentioned any threats of prosecuting Cadwaladr; that at the board meeting on the 6th day of April the directors made no promise in words to the plaintiff, T. E. Jones, that they would not prosecute Cadwaladr; that Cadwaladr, in applying to his relations for assistance, mentioned to them that unless he obtained the requisite sum by a certain day the directors intended to prosecute him; that the plaintiffs in coming forward were actuated by their fear that the directors intended to prosecute, and that their motive was known to the directors.

Jelf, Q.C. and H. Terrell for the plaintiffs.—The securities were given to the defendants in consequence of their threats to take criminal proceedings against Cadwaladr, and are therefore void: (*Collins v. Blantern*, 1 Sm. L. C., 9th edit. p. 398.)

Haldane, Q.C. and W. D. Rawlins for the defendants.—Where a felony has been committed it is not illegal either for the defaulting debtor or for a stranger to enter into an agreement to make good the debtor's default provided there is no intention on the part of any party to such agreement to stifle a prosecution: (*Ward v. Lloyd*, 7 Scott N. R. 499; 6 Man. & G. 785; *Flower v. Sadler*, 10 Q. B. Div. 572.) Here the agreement was legal, as it was quite apart from any such intention. [WILLIAMS, J. referred to *Windhill Local Board of Health v. Vint*, 52 L. T. Rep. N. S. 725; 45 Ch. Div. 351; and *Keir v. Leeman*, 7 L. T. Rep. O. S. 346; 9 Q. B. 371.]

Jelf in reply.—I rely on the proposition of law stated by Lord Lyndhurst in *Egerton v. Earl Brownlow* (21 L. T. Rep. N. S. 306; 4 H. of L. Cas. 1, 163), that any contract or engagement having a tendency, however slight, to affect the administration of justice, is illegal and void: (see also *Lound v. Grimwade*, 59 L. T. Rep. N. S. 168; 39 Ch. Div. 605, 612.) Here the defendants knew of Cadwaladr's embezzlement, and threatened and intended to take criminal proceedings against him, and I say that there was a tacit understanding actuating both parties to the agreement that these criminal proceedings should not be taken. Where a felony has been committed no action can be maintained for a civil debt until the criminal prosecution has first been disposed of. The principle upon which that rule is founded is, that the interest of the public requires that the law shall be vindicated before the individual who is wronged shall be permitted to have recourse to a civil remedy: (*Appleby v. Franklin*, 54 L. T. Rep. N. S. 135; 17 Q. B. Div. 93.) He also referred to *Williams v. Bayley* (14 L. T. Rep. N. S. 802; L. Rep. 1 H. of L. 200).

WILLIAMS, J. stated the facts and continued:—The question is,

whether these securities, which were taken by the directors, are valid securities, or whether they are securities given under such circumstances as to entitle the plaintiffs to the relief which they claim. This is not one of those cases in which there was no debt. There was an existing debt for money had and received. There was a debt in the sense that everyone who gets the money of another put into his hands, and has no consideration upon which he can rely to keep it, is liable to be sued for money had and received, and must return it. Under those circumstances, it seems to be established by the case of *Ward v. Lloyd* (*ubi sup.*) that a creditor is not disentitled, merely because he has come to the conclusion that his servant or agent has robbed him, and may have threatened his servant or agent with prosecution, from putting pressure upon him to recover the civil debt. But even in that case, I take it that, if an agreement had been made that there should be no prosecution, that agreement would have been void and illegal, and if the judgments of the learned judges in the case of *Ward v. Lloyd* (*ubi sup.*) are looked at, it will be seen that each one of them carefully avoids saying that the contract before the court in that case could have been supported if it had included a contract not to prosecute. Maule, J., for instance, puts this very shortly. He says: "In substance the transaction was fair and honest; and there is no necessity to impute to the plaintiff the making of a corrupt agreement which he expressly denied." That corrupt agreement is the agreement not to prosecute. "Any expectation that the defendant may have entertained, that, if he gave the required security, he might escape prosecution, will not of itself vitiate the transaction. Again, in the case of *Flower v. Sadler* (*ubi sup.*), which expressly follows and is based upon *Ward v. Lloyd* (*ubi sup.*), some, at all events, of the Lords Justices say the same thing. Cotton, L.J. says (10 Q. B. Div. at p. 576): "In my opinion a threat to prosecute does not necessarily vitiate a subsequent agreement by the debtor to give security for a debt, which he justly owes his creditor. I cannot satisfy myself that Denman, J. was wrong in the inference which he drew from the facts; he arrived at the conclusion that the bills were not indorsed under the influence of the plaintiffs' threat, and that the transaction between Maynard and the plaintiffs was done in the ordinary course of business." It is quite plain, therefore, that Cotton, L.J. would not have supported the indorsement in *Flower v. Sadler* (*ubi sup.*) if the indorsement had been expressly made in consideration of the promise not to prosecute. Therefore, it seems to me that the authorities come to this, that whenever there is an agreement not to prosecute, that is an illegal consideration to form a part of any contract, and the contract will be void. I do not think it makes any difference whether the agreement is expressed or implied. In fact, in the case of *Williams v. Bayley* (*ubi sup.*), and also in the case of *Brook v. Hook* (24 L. T. Rep. N. S. 34; L. Rep. 6 Ex. 89), the agreement not

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to prosecute was only implied; and in *Williams v. Bayley* (*ubi sup.*) the bargain included the giving up of the documents which were the *indicia* of the crime. The rule of law is, that whenever an agreement is made in consideration of a promise not to prosecute, such an agreement is made for an illegal consideration, and cannot be enforced, and will give the persons seeking to set aside such agreement the right to be put in the same position as they were before the agreement was entered into. That being so, what difference does it make that in any case there is an existing debt which the creditor has a right to recover? The difference it makes is this: It makes a difference in fact. It makes a difference as to the inference that you are to draw. I suppose that, of the whole number of cases which have occurred on this doctrine of law, there have been very few where parties to the agreement have put down in black and white, "I promise to pay you such and such a sum of money in consideration that you will not prosecute me for the offence which I have committed." That does not very often occur. It is nearly always a question of what the real agreement was, and not of what the express agreement was; and in considering the question of inference it is plain that the existence of a debt is a matter of great importance, because the debtor may be willing to pay his debt quite irrespective of any promise that he shall not be prosecuted. As I understand *Ward v. Lloyd* (*ubi sup.*) and *Williams v. Bayley* (*ubi sup.*), all that those cases decide is, that the mere fact that a debtor who may be acting under a proper sense of his duty to pay his debt has also the hope that if he pays the debt he will not be prosecuted, is not of itself sufficient to vitiate the agreement, unless the tribunal before whom the question comes is prepared to find that in the understanding of both parties it was a term of the agreement that there should be no prosecution. Now, I have to determine in this case whether it was a term of the agreement that there should be no prosecution. It will be borne in mind that in *Ward v. Lloyd* (*ubi sup.*), Tindal, C.J., when he is refusing in that case to draw the inference that it was an unexpressed but real term of the agreement there that there should be no prosecution, says: "It must be remembered that this is not the case of a security given to induce an uninterested party to withhold a charge of a criminal nature. There is a just debt due from the defendant to the plaintiff. The plaintiff may have held out threats of prosecution in order to induce the defendant to give the warrant of attorney; but there is the positive denial on the part of the plaintiff that he made any such agreement as that suggested." Also in *Flower v. Sadler* (*ubi sup.*) Cotton, L.J. says: "It seems to me that there is a distinction between getting a security for a debt from the debtor himself and getting it from a third person who is under no obligation to the creditor." Now, Tindal, C.J. and Cotton, L.J. take the two states of things which they consider are material to be considered when you are asking yourself the question, "Aye or no, was there

an agreement here?" The thing that Tindal, C.J. relies on is the existence of the debt, and the thing that Cotton, L.J. relies on is the fact of the promise to pay being by the debtor. Now, there is in this case that which Tindal, C.J. relied on—viz., the existence of the debt. At all events, there is a debt in the sense in which Tindal, C.J. used the word, because that was the case of an agent who had embezzled moneys. The question is, what is the proper conclusion to draw in the absence of that which Cotton, L.J. relied on—viz., the fact of the promise to pay being made by the debtor himself. For in this case undoubtedly the offer to make good the default, and the giving of the securities for that purpose, were by persons who were under no obligation whatsoever to pay the debt. I confess that, if I were to act upon my view of what would be right in this particular case, apart from the application of the rules of law, as I understand them, which have been laid down, I should be anxious if I could to support these securities. There does seem to me, morally at all events, to be an enormous difference between a case where the person receiving the security comes in contact with the person giving it and puts pressure upon the person giving it, and a case like the present, where the person receiving and the person giving the security hardly come in contact at all, and when, even when they do come into contact, there is no personal pressure exercised of any sort or kind. I say that, if I could see my way to support these securities, I should be glad under the circumstances to do so. I feel that, at all events, one ought to try and draw the line somewhere so as not to have it said that every time the friends of a man, who has been guilty of a criminal act, come forward and take upon themselves the debts he may have incurred in connection with his crime, their offer is to be treated as void or illegal. If one ought not so to lay down the law as to include every one of these cases, where is one to draw the line? Let us look on one side of the line and the other. It would seem to be clear that, so far as the persons giving the security are concerned, they must be cognisant of the crime which the person whom they seek to help has committed, otherwise the doctrine does not seem applicable at all. That is present here, because there is no doubt Mr. and Mrs. Jones both knew that their relative had been guilty of these frauds. Then one must, I think, also find that the persons coming forward and taking upon themselves the debt, must have been actuated by the desire to prevent a prosecution. That is also present here. I have no doubt that Mr. and Mrs. Jones, in coming forward were actuated by the desire to prevent a prosecution, and somehow or other it seems to me that the very form of the agreement which, in my view, put an end to the indebtedness of Cadwaladr for the 526*l.* altogether, was, to some extent, affected by their desire that the matter should be carried through as to most effectually give them that which they wanted—that is to say, the prevention of the prosecution. But that is not enough; something is wanted on the other side. Now, on

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the other side there must be, in the first place, either an intention to prosecute, or threats to prosecute, and I find here that there were threats to prosecute. But then something more is wanted on that side. I think that the persons receiving the promise or the security must be aware that the person giving the promise or the security would not have come forward but for the threat or the probability of the prosecution. When I say that all these things are necessary and are present in this case, I think that I still leave it possible that many cases might occur of persons coming forward and undertaking to make good the default of a man who has committed a crime, from which these elements would be absent on one side or the other. I now proceed to consider the grounds on which I have come to the conclusion that these elements are present here. At one time I was not sure that the plaintiffs were induced to give the promise which they gave by reason of the wish that they had to get rid of the prosecution of Cadwaladr. I was not sure whether they might not have given this promise even apart from the hope of avoiding a prosecution. The plaintiffs took security from Cadwaladr. They took security from a criminal, and it occurred to me that possibly one might infer that what induced them to take upon themselves the responsibility for this debt was not the hope, or expectation, or understanding that Cadwaladr should not be prosecuted, but their belief that whether Cadwaladr was prosecuted or not they were incurring no money liability. But, on the whole, I do not think that I ought to come to that conclusion. No doubt they did attempt to protect themselves from money loss by taking this security; but having regard to the evidence of young Cadwaladr, and that letter which he wrote at the dictation of his father to Mr. Elias Jones, I think that I ought to come to the conclusion that Mr. Elias Jones and Mrs. Jones took upon themselves this liability in respect of a matter as to which they were under no responsibility at all, because they hoped thereby to prevent the prosecution of their relative. Had it not been for that hope they would never have taken upon themselves this responsibility at all. That being so, I have only to ask myself the further question, Did the directors of this company know that it was the fear of the prosecution of their relative which induced Mr. and Mrs. Jones to come forward, and did they, trading upon that fear, accept the payment and the promise of payment from Mr. and Mrs. Jones? On the whole, I have come to the conclusion that they did know it, and I am a good deal influenced in this conclusion by the resolution of the 30th day of March, a resolution which seems to me to show that Cadwaladr must have mentioned to the directors the hope of getting his relatives to come forward and save him from prosecution. Under these circumstances I find, not only that Mr. and Mrs. Jones entered into this contract and made themselves liable, and made this payment by reason of their fear of the prosecution of their relative, but that the directors, when they

accepted this payment and accepted this agreement, knew they were getting it by reason of Mr. and Mrs. Jones fearing the prosecution of Cadwaladr. Therefore, they may be said to have traded on, or made profit by this fear. I must give my judgment for the plaintiffs.

Solicitors for the plaintiffs, *Indermaur and Brown*, for *J. T. Roberts and Roberts*, Carnarvon.

Solicitors for the defendants, *Robbins, Billing, and Co.*, for *George Henry Ellis*, Blaenan, Festiniog.

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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Thursday, July 23, 1891.

(Present: The Right Hons. The LORD CHANCELLOR (Halsbury),
Lords WATSON, HOBHOUSE, and MACNAGHTEN, and Sir RICHARD
COUCH.)

MACLEOD v. ATTORNEY-GENERAL FOR NEW SOUTH WALES. (a)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

*Bigamy—Jurisdiction of Colonial Courts—Law of New South
Wales—Criminal Law Amendment Act, 1883 (46 Vict. No. 17),
s. 54.*

*The Criminal Law Amendment Act, 1883, of New South Wales,
sect. 54, enacts, "Whosoever, being married, marries another
person during the life of the former husband and wife, whereso-
ever such marriage takes place, shall be liable to penal servitude
for seven years."*

*Held, that the word "whosoever" must be construed "whosoever,
being married, and amenable at the time of the offence committed
to the jurisdiction of the colony of New South Wales;" and the
word "wheresoever" must be construed "wheresoever in the
colony the offence is committed."*

*The appellant married a wife in New South Wales in 1872. In
1889, during her lifetime, he went through the form of marriage
with another woman in the United States of America.*

*Held, that the Courts of New South Wales had no jurisdiction to
try him for bigamy in respect of such second marriage.*

Judgment of the court below reversed.

THIS was an appeal from an order of the Supreme Court of
New South Wales, dated the 4th day of July, 1890, dismiss-

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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ing an appeal by way of special case from the conviction of the appellant by the Court of Quarter Sessions at Sydney, in that colony, for bigamy, such appeal being upon points reserved at his trial by the chairman of that court.

The appellant was tried before the Court of Quarter Sessions, on the 29th day of May, 1890, and found guilty of bigamy, and upon the 18th day of June, 1890, sentenced to three years' imprisonment with hard labour, and the question to be decided in this appeal was whether the conviction was to be quashed by reason of the reception in evidence by the learned chairman of the Court of certain letters and documents, the admissibility of which was objected to at the trial, or by reason of his directing the jury to the effect that if they were satisfied that the appellant had gone through the form and ceremony of marriage with Miss Cameron (the alleged second wife) at the time alleged, the appellant could be found guilty of the offence of bigamy although no formal evidence was given as to the marriage law of the State of Missouri, in the United States of America, the alleged bigamous marriage to Miss Cameron having occurred at St. Louis, in that State. These two contentions or points were, at the request of the appellant's counsel, reserved by the learned chairman for the opinion of the Supreme Court of the colony.

The facts proved at the trial were:—Appellant was a British subject, and a minister of the Presbyterian Church in New South Wales. He married Mary Manson, his first wife, on the 21st day of July, 1872, at Winslow, Darling Point, in the said colony. After residing in the said colony the appellant and his wife left and went to Scotland, from thence to Canada, thence back to Scotland, thence to New Zealand, and from there returned to New South Wales in 1887, and again left and went to the United States, and thence to London, where, on the 25th day of June, 1888, his wife left him and returned to New South Wales, where she resided until the trial. Upon the 8th day of May, 1889, at St. Louis, Missouri, in the United States of America, the appellant went through the form and ceremony of marriage with Mary Cameron, his wife, Mary McLeod, being then alive. The appellant and Mary Cameron after such ceremony lived together as husband and wife. Before the appellant married Mary Cameron he obtained from a district court of the United States, Territory of New Mexico, a decree of divorce from his wife Mary Macleod, dated the 25th day of March, 1889, which was put in evidence at his trial, but such decree was obtained without notice of proceedings being given to his said wife.

At the trial the appellant's counsel objected to the reception in evidence of the appellant's letters, on the grounds that they were immaterial, written after the bigamous marriage, and could not be used as admissions of the appellant, but the learned chairman of the court admitted them as tending to prove the bigamous marriage.

The marriage certificate, and the copy of the marriage licence,

with the solemnisation of the marriage certified by the officiating minister at the foot thereof, were also objected to by the appellant's counsel, and admitted in evidence at the trial by the learned chairman.

At the request of the appellant's counsel at the trial, the only plea being that of not guilty, the learned chairman reserved two points, which in the special case were set out, viz. : (1) Whether he was right in admitting the letters and documents objected to by the appellant's counsel? (2) Whether he was right in directing the jury as he did?

The special case, which was stated under sect. 422 of the New South Wales Criminal Law Amendment Act, 1883 (46 Vict. No. 17), came on for argument before the Supreme Court of New South Wales, and upon the 4th July, 1890, the said appeal was dismissed, and the conviction of the appellant sustained, Darley, C.J. and Innes, J. having so decided, while Windeyer, J. dissented.

From this judgment the appellant obtained leave to appeal.

Fullarton, Q.C. appeared for the appellant.

Rigby, Q.C. and *Pollard* for the respondent.

At the conclusion of the arguments their Lordships' judgment was delivered by

The LORD CHANCELLOR (Halsbury).—The facts upon which this appeal arises are very simple. The appellant was, on the 18th day of July, 1872, at Darling Point, in the colony of New South Wales, married to one Mary Manson, and, in her lifetime, on the 8th day of May, 1889, he was married, at St. Louis, in the State of Missouri, in the United States of America, to Mary Elizabeth Cameron. He was afterwards indicted, tried, and convicted, in the colony of New South Wales, for the offence of bigamy, under the 54th section of the Criminal Law Amendment Act of 1883 (46 Vict. No. 17). That section, so far as it is material to this case, is in these words: "Whosoever, being married, marries another person during the life of the former husband or wife—wheresoever such second marriage takes place—shall be liable to penal servitude for seven years." In the first place, it is necessary to construe the word "whosoever;" and in its proper meaning it comprehends all persons all over the world, natives of whatever country. The next word which has to be construed is "wheresoever." There is no limit of person, according to one construction of "whosoever;" and the word "wheresoever" is equally universal in its application. Therefore, if their Lordships construe the statute as it stands, and upon the bare words, any person married to any other person, who marries a second time anywhere in the habitable globe, is amenable to the criminal jurisdiction of New South Wales, if he can be caught in that colony. That seems to their Lordships to be an impossible construction of the statute; the colony can have no such jurisdiction, and their Lordships do not desire to attribute to the colonial Legislature an effort to enlarge their

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jurisdiction to such an extent as would be inconsistent with the powers committed to a colony, and, indeed, inconsistent with the most familiar principles of international law. It therefore becomes necessary to search for limitations, to see what would be the reasonable limitation to apply to words so general; and their Lordships take it that the words "whosoever being married" mean, "Whosoever being married, and amenable, at the time of the offence committed, to the jurisdiction of the colony of New South Wales." The word "wheresoever" is more difficult to construe, but when it is remembered that in the colony, as appears from the statutes that have been quoted to their Lordships, there are subordinate jurisdictions, some of them extending over the whole colony, and some of them, with respect to certain classes of offences, confined with local limits of venue, it is intelligible that the 54th section may be intended to make the offence of bigamy justiciable all over the colony, and that no limits of local venue are to be observed in administering the criminal law in that respect. "Wheresoever," therefore, may be read, "Wheresoever in this colony the offence is committed." It is to be remembered that the offence is the offence of marrying, the wife of the offender being then alive—going through, in fact, the ceremony of marriage with another person while he is a married man. That construction of the statute receives support from the subordinate arrangements which the statute makes for the trial, the form of the indictment, the venue, and so forth. The venue is described as New South Wales, and sect. 309 of the statute provides that "New South Wales shall be a sufficient venue for all places, whether the indictment is in the Supreme Court, or any other court having criminal jurisdiction. Provided that some district, or place, within, or at, or near which, the offence is charged to have been committed, shall be mentioned in the body of the indictment. And every such district or place shall be deemed to be in New South Wales, and within the jurisdiction of the court "unless the contrary be shown." That, by plain implication, means that the venue shall be sufficient, unless the contrary is shown. Upon the face of this record the offence is charged to have been committed in Missouri, in the United States of America, and it therefore appears to their Lordships that it is manifestly shown, beyond all possibility of doubt, that the offence charged was an offence which, if committed at all, was committed in another country, beyond the jurisdiction of the colony of New South Wales. The result, as it appears to their Lordships, must be that there was no jurisdiction to try the alleged offender for this offence, and that this conviction should be set aside. Their Lordships think it right to add that they are of opinion that, if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at the bar, it would have been beyond the jurisdiction of the colony to enact such a law. Their jurisdiction is confined within their

own territories, and the maxim which has been more than once quoted, "*Extra territorium jus dicenti impune non paretur*," would be applicable to such a case. Lord Wensleydale, when Baron Parke, advising the House of Lords in *Jefferys v. Boosey* (4 H. of L. Cas. 815), expresses the same proposition in very terse language. He says (p. 926): "The Legislature has no power over any persons except its own subjects, that is, persons natural-born subjects, or resident, or whilst they are within the limits of the kingdom. The Legislature can impose no duties except on them; and, when legislating for the benefit of persons, must *prima facie* be considered to mean the benefit of those who owe obedience to our laws, and whose interests the Legislature is under a correlative obligation to protect." All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and except over her own subjects Her Majesty and the Imperial Legislature have no power whatever. It appears to their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than Her Majesty's subjects; more than any persons who may be within the jurisdiction of the colony by any means whatsoever; and that, therefore, if that construction were given to the statute it would follow as a necessary result that the statute was *ultra vires* of the colonial Legislature to pass. Their Lordships are far from suggesting that the Legislature of the colony did mean to give to themselves so wide a jurisdiction. The more reasonable theory to adopt is, that the language was used subject to the well-known and well-considered limitation, that they were only legislating for those who were actually within their jurisdiction, and within the limits of the colony. For these reasons their Lordships will humbly advise Her Majesty that the judgment of the Supreme Court should be reversed, and that this conviction should be set aside. The respondent must pay the costs of the appeal.

Solicitors for the appellant, *Yielding, Barlow, and Piper*.

Solicitor for the respondent, *R. O. Want*.

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QUEEN'S BENCH DIVISION.

Wednesday, April 22, 1891.

(Before SMITH and GRANTHAM, JJ.)

ELLIOTT v. OSBORN. (a)

Cruelty to animals—Nonfeasance—No evidence of guilty knowledge of animal's condition—Prevention of Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), s. 2.

The appellant, a receiver of large consignments of cattle, which he was supposed to personally receive and attend to, had not removed the head ropes from the cattle (which arrived in port on Saturday) until the Monday following.

The magistrates having convicted the defendant of cruelty for not removing the head ropes,

The defendant appealed on the ground that there was no guilty knowledge on his part, and that there was no intentional cruelty on his part.

Held, there being no evidence of a guilty knowledge on the appellant's part, or that the appellant wilfully abstained from the knowledge of the alleged cruelty, the conviction must be quashed.

THIS was a case stated by the deputy stipendiary magistrate of Birkenhead, and involved the question whether an importer of cattle is liable to be convicted of cruelty to animals upon the following facts :

The respondent was an inspector of the Royal Society for the Prevention of Cruelty to Animals, and laid a complaint before the stipendiary magistrate against the appellant under 12 & 13 Vict. c. 92, sect. 2, which enacts as follows :

That if any person shall from and after the passing of this Act cruelly beat, ill-treat, over-drive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal, every such offender shall for every such offence forfeit and pay a penalty not exceeding five pounds.

The respondent in the information charged the appellant "that he did on Oct. 13 cruelly ill-treat and torture a certain bullock by neglecting to loosen the head-rope by which it was tethered."

The appellant was a receiver of large consignments of cattle from America, which he personally attended to, and he personally received the cattle in question. A large trade exists in the importation of live cattle from the American ports. The

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

cattle when shipped from America are secured in their pens by short ropes from 4ft. to 6ft. long (called the head-ropes), which pass round the base of the horns.

During the voyage it frequently happens that, owing to the motion of the vessel, these head-ropes scrub off the skin at the roots of the horns and become embedded in the flesh. On arriving in England the cattle are disembarked as speedily as possible, and then driven into spacious lairages, where they are penned, tied up, fed, and the head ropes removed from round the horns of those whose heads are injured, and passed round their necks. On Saturday, the 11th day of October, about 10 p.m., a ship arrived with several hundred cattle on board, which were received by the appellant. The cattle were all landed and penned that night in the lairages.

On the following day (Sunday) the appellant was in the lairages among the cattle. On Monday, the 13th day of October, the respondent visited the lairages in his capacity as inspector for the Royal Society for the Prevention of Cruelty to Animals, and found one of the cattle had a wound 4in. or 5in. in length in the flesh around the base of the horn. In this wound the head-rope, which had not been removed, was almost embedded, and the animal appeared to be in pain. The respondent pointed this out to the appellant, who said, "Yes, I have started three or four men to attend to them. I will tell you how it is: these cattle came in late on Saturday night, and we had two boats in yesterday. The respondent said, "Yes; but to-day is Monday; these heads should have been attended to first thing yesterday morning."

The appellant promised this should be done at once. At the time the respondent entered the lairages none of the head-ropes had been removed.

The magistrate fined the defendant 40s. and costs, and he now appealed.

Bankes for the appellant.—The complaint does not disclose an offence under 12 & 13 Vict. c. 92. The evidence before the magistrate does not show that the defendant committed any offence under the statute. There is no evidence of any knowledge on the part of the appellant; at the very most it was only carelessness and not intentional cruelty. If the appellant actually saw the bullock in the state it was, and did not take any proper means to release it, the appellant might then be very properly convicted. Here there was no evidence of such; on the contrary, the appellant did his best to get all the head-ropes taken off. The magistrate did not find that the condition of the bullock was known to the appellant. Some knowledge of the matter is essential for the commission of the offence: (*Westbrook v. Field*, 51 J. P. 726; *Small v. Wall*, 47 J. P. 20; *Powell v. Knight*, 38 L. T. Rep. N. S. 607; *Everitt v. Davies* 38 L. T. Rep. N. S. 360.)

Colam for the respondent.—A man who receives a large

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v.
OSBORN.

1891.

*Cruelty to
Animals—
Mens rea—
Nonfeasance
—No evidence
of guilty
knowledge of
animal's
condition—
12 & 13 Vict.
c. 92, s. 2.*

ELLIOTT
v.
OSBORN.
—
1891.
—

*Cruelty to
Animals—*

*Mens rea—
Nonfeasance
—No evidence
of guilty
knowledge of
animal's
condition—
12 & 13 Vict.
c. 92, s. 2.*

consignment of cattle, and knows in what state they will probably arrive, cannot by shutting his eyes to their condition prevent himself from being liable to a conviction for cruelty to animals. The term "intentional cruelty," used in some of the cases, only means some knowledge of the facts out of which the cruelty arises.

SMITH, J.—If a man knowing the state of this animal on a Saturday night left it with a rope embedded in its neck, until the Monday morning following, I should without any doubt find that there had been cruelty. The fact in this case was different. The appellant did not know of the animal's condition. There is no evidence that the appellant wilfully abstained from knowing the condition of this bullock, or that he shut his eyes to the fact, which, in my opinion, would be sufficient evidence that he did know of the animal's condition. In my opinion the defendant was not guilty of the offence alleged against him, and the conviction must therefore be quashed.

GRANTHAM, J.—I am of the same opinion. I have no doubt that the magistrate was wrong. The defendant had many men under him, and he had given specific orders to his foreman that he was to examine all the heads of cattle as they arrived. Two other cargoes of cattle come in on the Sunday. Can it be said that the appellant was to look after each bullock? It would be clearly impossible. I do not know why the foreman or man who had the tying up of the bullocks in the lairages was not charged; he was, no doubt, careless. It would, however, be manifestly unjust that the man who knew nothing of the matter should be convicted.

Conviction quashed .

Solicitors for the appellant, *Hamlin, Grammer, and Hamlin*, for *Moore and Sons*, Birkenhead.

Solicitor for the complainant, *Leslie*.

QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

Aug. 4 and 7, 1891.

(Before WILLIAMS, J.)

*Re ARMSTRONG; Ex parte LINDSAY. (a)**Bankruptcy—Application to commit—Privilege of Parliament.**The privilege attaching to members of Parliament, which protects them from arrest for contempt of court in not obeying civil process, does not extend to cases where the contempt is in its nature or by its incidents of a criminal character.**Where a member of Parliament refused to submit to be examined on oath pursuant to a summons issued under sect. 27 of the Bankruptcy Act, 1883, on application to commit him for contempt of court :**Held, that the defence of parliamentary privilege was an answer to the application, and that an order for committal would not be made.*

THIS was an application by the trustee to commit to prison Frederick Wootton Isaacson, member of Parliament for the Stepney division, for alleged contempt in having refused to be examined on oath pursuant to a summons issued by the court, and an order made thereon by the registrar on the 18th day of June, 1891.

The summons was under sect. 27 of the Bankruptcy Act, 1883, which enacts that :

(1) The court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the court may deem capable of giving information respecting the debtor, his dealings or property, and the court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property.

(2) The court may examine on oath, either by word of mouth or by written interrogatories, any person so brought before it concerning the debtor, his dealings or property.

An order had been obtained from the Sheriff Substitute of Roxburgh for the examination of Mr. Isaacson under sect. 90 of the Scotch Bankruptcy Act, on the application of the trustee of the sequestered estate of W. Armstrong.

In accordance with this order, and at the request of the sheriff substitute, a summons was taken out, under sect. 27, on the 27th day of May, 1891.

(a) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

*Re ARM-
STRONG; Ex
parte LINDSAY.*

1891.

*Contempt of
court—
Privilege of
Parliament—
Distinction
between con-
tempt in
criminal and
contempt in
civil proceed-
ings—Refusal
to comply
with order of
Court in
Bankruptcy
examination
—Application
to commit.*

The registrar appointed the 13th day of June for the examination of Mr. Isaacson, and a copy of the summons was served on him, but the examination was adjourned to the 13th day of July, owing to the illness of Mr. Isaacson.

On the 13th day of July Mr. Isaacson attended, and refused to be sworn, acting under the advice of his counsel, and this motion was made to commit him to prison for contempt.

By sect. 117 of the Bankruptcy Act, 1883, it is enacted that :

Any order made by a court having jurisdiction in bankruptcy in England under this Act shall be enforced in Scotland and Ireland in the courts having jurisdiction in bankruptcy in those parts of the United Kingdom respectively, in the same manner in all respects as if the order had been made by the court hereby required to enforce it; and in like manner any order made by a court having jurisdiction in bankruptcy in Scotland shall be enforced in England and Ireland, and any order made by a court having jurisdiction in bankruptcy in Ireland shall be enforced in England and Scotland by the courts respectively having jurisdiction in bankruptcy in the part of the United Kingdom where the orders may require to be enforced, and in the same manner in all respects as if the order had been made by the court required to enforce it in a case of bankruptcy within its own jurisdiction.

Sect. 118. The High Court, the County Courts, the courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the court seeking aid, with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court which made the request or the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions.

Firminger, in support of the application to commit, stated the facts.

A. Young for Mr. Isaacson.—There are several objections to the motion: First, the summons is made pursuant to an order of the Bankruptcy Act, 1869. That Act is repealed, so the summons is invalid. Next the request describes the Court as the Bankruptcy Court of London, and the summons speaks of the London Court of Bankruptcy. Lastly, Mr. Isaacson is a member of Parliament, and so is privileged from arrest. Sect. 124 of the Bankruptcy Act, 1883, enacts that, "if a person having privilege of Parliament commits an act of bankruptcy he may be dealt with as if he had not such privilege." This shows that privilege of Parliament is not taken away in any other case except that one, *e.g.*, when he commits an act of bankruptcy. The most recent case on the subject is *Re The Anglo-French Co-operative Society* (14 Ch. Div. 553). In that case a motion to commit Mr. Harrison was dismissed on the ground that, though Harrison had for twenty-two days prior to the motion ceased to be a member of Parliament, still he had forty days in which he could not be committed. The next case is *Gondy v. Duncombe* (1 Ex. 430), where Pollock, C.B. said: "The question then is, what is the privilege of Parliament with reference to freedom from arrest? In Blackstone's Commentaries it is said that in the case of a commoner this privilege from arrest extends to forty days after every prorogation, and forty days before the next appointed meeting. In Bacon's Abridgment, tit. "Privilege," 4, the authorities

are collected. It appears that in an old Irish statute (3 Edw. 4, c. 1), the privilege is expressly limited to forty days before and forty days after the meeting of Parliament." [WILLIAMS, J.—We need not enter into a discussion as to what the time is.] The case is covered by *Re The Anglo-French Co-operative Society*. The court will not interfere in the case of a member of Parliament having privilege, and Parliament is now sitting.

Firminger in reply.—Contempt is an offence of a criminal nature. May's Practice of Parliamentary Government, p. 55, after saying that offences of a criminal nature are not privileged, says: "Another description of offence partaking of a criminal character is a contempt of a court of justice." Then he gives a series of instances, of which *Long Wellesley's* is the chief. The case is reported 2 R. & M. 639, and referred to in *Re Gent*; *Gent-Davis v. Harris* (40 Ch. Div. 190, at p. 196; 60 L. T. Rep. N. S. 335). [WILLIAMS, J.—This was referred to in the argument of the *Anglo-French Co-operative Society*.] Yes. All the proceedings under the Bankruptcy Act partake of a criminal nature, and if the contempt is of a criminal nature there is no privilege. [WILLIAMS, J.—What is your authority for this?] Sir F. Erskine May's book. [WILLIAMS, J.—Of course I will listen to that, but it is not an authority.] *Long Wellesley's* case is an authority. In *Re Gent*; *Gent-Davis v. Harris* (*ubi sup.*), North, J. refers to Lord Brougham's judgment in *Long Wellesley's* case at p. 665 of the report. "The line then which I draw is this: that against all civil process privilege protects, but that against contempt for not obeying civil process, if that contempt is in its nature or by its incidents criminal, privilege protects not; that he who has privilege of Parliament in all civil matters which, whatever be the form are in substance of a civil nature, may plead it with success, but that he can in no criminal matter be heard to urge such privilege; that members of Parliament are privileged against commitment *quâ* process to compel them to do an act, &c." [WILLIAMS, J.—Is this the law? as if so it seems to put you out of court.] It is enlarged by *Re Freston* (49 L. T. Rep. N. S. 290; 11 Q. B. Div. at p. 545), which is recently compared to *Long Wellesley's* case. In *Re Freston* the Master of the Rolls said, "There were, however, other kinds of contempt in which attachments were granted for the purpose of preventing a breach of the law, and maintaining the discipline of the courts, and in these cases the question is whether the attachment is more like criminal or civil process, whether it is more like arrest for a crime, or more like the enforcement of a decree in a suit between parties." This is more like arrest for crime, because a warrant can be issued to a constable, and can be enforced out of the country. Then, the Master of the Rolls, after pointing out that it is not the form of the process, but the cause which is to be looked at, says: "If the ground of the proceeding be a debt, it is a process of debt; if the ground be a contempt, as, for instance, disobedience of some order of the

Re ARM-STRONG; Ex parte LINDSAY.

1891.

Contempt of court — Privilege of Parliament — Distinction between contempt in criminal and contempt in civil proceedings—Refusal to comply with order of Court in Bankruptcy examination —Application to commit.

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STRONG; Ex
parte LINDSAY.*

1891.

*Contempt of
court—
Privilege of
Parliament—
Distinction
between con-
tempt in
criminal and
contempt in
civil proceed-
ings—Refusal
to comply
with order of
Court in
Bankruptcy
examination
—Application
to commit.*

court, where the object was not to recover a debt by means of the process, the consequences of such a process are in some degree of a criminal nature." [WILLIAMS, J.—The question then is, whether Mr. Isaacson, when he disobeyed this order to give evidence, thereby became subject to criminal process or merely civil?] Yes. [WILLIAMS, J.—Suppose the witness now comes forward and says he will answer the questions and pay the costs, could you keep him a moment longer in prison if he were there?] Yes. [WILLIAMS, J.—What justifies that?] I argue from sect. 27 (2): "If any person so summoned, after having been tendered a reasonable sum, refuses to come before the court . . . the court may by warrant cause him to be apprehended and brought up for examination." A warrant can be issued. [WILLIAMS, J.—Can you keep him after answering the questions?] Yes. The moment he disobeys the summons the offence becomes one of a different nature. I submit that the privilege cannot prevail here, and that the order should be made.

Our. adv. vult.

Aug. 7.—WILLIAMS, J.—This was a motion to commit to prison Mr. Isaacson for alleged contempt of court in not having submitted to be examined. The summons was issued pursuant to sect. 27 of the Bankruptcy Act, 1883, and there was a request, &c., by the Sheriff Substitute of Roxburgh, according to the provisions of sect. 117 and 118 of the same Act. This summons was served upon Mr. Isaacson, who did not attend, but by his solicitor obtained an adjournment to the 13th July on account of the condition of his health. On the 13th July he attended at Mr. Registrar Giffard's chambers, but refused to be examined on oath. The registrar ordered the examination to proceed, but Mr. Isaacson again refused to be sworn, and this application was made to me to commit him to prison for contempt of court. The objections offered by counsel for Mr. Isaacson were: (1) that the summons, being made pursuant to an order of the Bankruptcy Act of 1869 (repealed) was invalid; (2) that the request described the Court as the Bankruptcy Court of London, and that the summons spoke of the London Court of Bankruptcy. These objections were also urged in various guises before the Court on Tuesday, but there was really nothing in them. Mr. Isaacson attended before the registrar in obedience to a summons pursuant to order and request of the Sheriff Substitute of Roxburghshire, and properly so described on the face of the summons, and he thereby waived any irregularity either in the form of the summons or in the description of the Court. I wish to add it was not the fact that the Scottish order was made under the English Bankruptcy Act of 1869. It was made under the Bankruptcy (Scotland) Act of 1856; nor was it otherwise described. It was the request only which was described as being made under the Act of 1869, and this error in the description of the powers under which the Scottish Court asked the English Court to act as auxiliary was not a matter going to the jurisdic-

tion of the English Court, or a matter which could be taken advantage of by Mr. Isaacson. Mr. Isaacson had filed an affidavit, in which he said that, in the event of these preliminary objections being ultimately overruled, he was willing to submit to examination. I do overrule those objections, and if Mr. Isaacson now states that he is willing to submit to examination the practical purpose of the application will be attained. [Counsel for Mr. Isaacson here intimated that Mr. Isaacson would abide by what he had said in his affidavit.] It is nevertheless necessary, having regard to another objection raised by counsel on behalf of Mr. Isaacson, that I should deal with that objection. The objection was, that Mr. Isaacson being a member of Parliament the order of committal asked for could not be made against him by reason of privilege of Parliament. With that objection I agree, as it seems to be well founded. The rule in the matter of privilege was laid down by Lord Brougham in *Long Wellesley's* case (*ubi sup.*, at p. 665). That rule was also acted on by Hall, V.C., in *Re Anglo-French Co-operative Society* (*ubi sup.*). The result was, that the question before the court was whether this motion was made to punish Mr. Isaacson, or merely in the nature of attachment for contempt as a means of enforcing obedience to the order of the court. I think it was a process to compel performance. It is true that this proceeding was not an attachment in a technical sense, but was an application for committal. It is true that the arrest of Mr. Isaacson could not be brought about without a second order beyond the order for his examination, which he disobeyed. But the committal, if ordered in the present case, would not be punitive, but merely a civil process. I do not say that a witness might not so refuse in open court to answer questions he was ordered to answer, as that it might amount to personal contempt, and be punishable as such in the exercise of the inherent common law jurisdiction of the Court or under the provisions of rule 70 of the Bankruptcy Rules of 1886. But in the present case there is no element of personal contempt or any offence committed for which Mr. Isaacson could be sent to prison as a punishment. Any imprisonment ordered in the present case would be civil process, and would determine *ex debito justitiæ* as soon as the person committed yielded obedience to the order of the Court and paid the costs. If the Bankruptcy Act of 1883 and the Rules of 1886 are looked at, it is plain that the framers had present to their minds the distinction between the two kinds of contempt—process and punishment. In sects. 16, 24, and 50, which dealt with offences, the Act speaks not only of the offender being dealt with as for contempt of court, but says the offender shall be punishable. For these reasons the motion must fail.

*Re ARM-
STRONG; Ex
parte LINDSAY.*

1891.

*Contempt of
Court—
Privilege of
Parliament—
Distinction
between con-
tempt in
criminal and
contempt in
civil proceed-
ing—Refusal
to comply
with order of
Court in
Bankruptcy
examination
—Application
to commit.*

Application dismissed.

Solicitors for the applicant, *Harrison, Wilkinson and Raikes.*

Solicitors for the respondent, *Waldron, Laurence, and Baker.*

QUEEN'S BENCH DIVISION.

April 28, 29, and July 14, 1891.

(Before Lord COLERIDGE, C.J., MATHEW, CAVE, SMITH, and CHARLES, JJ.)

CONNOR v. KENT.

GIBSON v. LAWSON.

CURRAN v. TRELEAVEN. (a)

Intimidation—Meaning of term—Trade union—Threat to cause strike unless employer ceases to employ workmen not members—No violence to person or property threatened—Practice—Evidence of defendant—Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 3; s. 7, sub-sect. 1.

The evidence of the defendant in proceedings under sect. 7 of the Conspiracy and Protection of Property Act, 1875, is inadmissible.

Where, therefore, evidence which had been given by a defendant upon a charge of intimidation under the section formed part of the grounds upon which he was convicted, the conviction was quashed.

In order to support a charge of intimidation under sect. 7 of the Conspiracy and Protection of Property Act, 1875, it is not sufficient to prove the use of threats which merely caused the person threatened to fear that he would lose the employment he was in at the time the threats were made use of, and that he would be unable to obtain any employment subsequently. Nor is it sufficient to prove acts of coercion, not unlawful in themselves, the effect of which was to cause an employer's workmen to leave their employment, without giving the notice required by their contracts with their employer.

Quære, whether in order to support such a charge the intimidation must not amount at least to such intimidation as would have been within the repealed enactment contained in sub-sect. 2 of sect. 1 of the Trade Union Act, 1871, namely, intimidation which would justify a justice of the peace on complaint made to him to bind over the person intimidating to keep the peace.

(a) Reported by ALFRED H. LEFROY, Esq., Barrister-at-Law.

Reg. v. Drutt (10 *Cox C. C.* 592) and *Reg. v. Bunn* (12 *Cox C. C.* 316) *dissented from.*

THESE three cases of alleged attempts to intimidate within the meaning of sect. 7, sub-sect. 1, of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86) were ordered to be argued before a specially constituted court of five judges.

By 6 Geo. 4, c. 129, ss. 1 and 2, the Act 5 Geo. 4, c. 95, and other Acts are repealed.

By 34 & 35 Vict. c. 32, passed in 1871, the Act 6 Geo. 4, c. 129, is repealed, and, by sect. 1 :

Every person who shall do any one or more of the following acts, that is to say : 1. Use violence to any person or any property ; 2. Threaten or intimidate any person in such manner as would justify a justice of the peace, on complaint made to him, to bind over the person so threatening or intimidating to keep the peace ; 3. Molest or obstruct any person in manner defined by this section, with a view to coerce such person (1) being a master, to dismiss, or to cease to employ any workman, or being a workman, to quit any employment or to return work before it is finished ; (2) being a master not to offer, or being a workman, not to accept, any employment or work ; (3) being a master or workman, to belong or not to belong to any temporary or permanent association or combination ; (4) being a master or workman, to pay any fine or penalty imposed by any temporary or permanent association or combination ; (5) being a master to alter the mode of carrying on his business, or the number or description of any persons employed by him, shall be liable to imprisonment, with or without hard labour, for a term not exceeding three months.

A person shall for the purposes of this Act be deemed to molest or obstruct another person in any of the following cases, that is to say : (1) If he persistently follow such person about from place to place ; (2) if he hide any tools, clothes, or other property, owned or used by such person, or deprive him of or hinder him in the use thereof ; (3) if he watch or beset the house, or other place, where such person resides or works, or carries on business, or happens to be, or the approach to such house or place, or if with two or more persons he follow such person in a disorderly manner in or through any street or road.

Nothing in this section shall prevent any person from being liable under any other Act or otherwise, to any other or higher punishment than is provided for any offence by this section, so that no person be punished twice for the same offence : Provided that no person shall be liable to any punishment for doing or conspiring to do any act on the ground that such act restrains or tends to restrain the free course of trade, unless such act is one of the acts hereinbefore specified in this section, and is done with the object of coercing as hereinbefore mentioned.

By the Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 2 :

The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.

By the Conspiracy and Protection of Property Act 1875 (38 & 39 Vict. c. 86), s. 3 :

An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.

Nothing in this section shall exempt from punishment any person guilty of a conspiracy for which a punishment is awarded by any Act of Parliament.

By sect. 7 :

Every person who with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing wrongfully and without legal authority—(1) Uses violence to or intimidates such

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v.
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v.
LAWSON ;
CURRAN
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Intimidation
—*Meaning of*
term—Trade
union—
Threat to
cause strike—
Violence to
person or pro-
perty not
threatened—
Practice—
Evidence of
defendant—
Conspiracy
and Protec-
tion of Pro-
perty Act,
1875—38 & 39
Vict. c. 86,
ss. 3, 7 (1).

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v.
KENT;
GIBSON
v.
LAWSON;
CURRAN
v.
TRELLHAVEN.
—
1891.

other person or his wife or children, or injures his property; or (2) persistently follows such other person about from place to place; or (3) hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or (4) watches or besets the house or other place where such other person resides or works, or carries on business, or happens to be, or the approach to such house or place; or (5) follows such other person with two or more other persons in a disorderly manner in or through any street or road, shall, on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour.

By sect. 17 the Act 34 & 35 Vict. c. 32, is repealed.

Intimidation
—Meaning of
term—Trade
union—
Threat to
cause strike—
Violence to
person or pro-
perty not
threatened—
Practice—
Evidence of
defendant—
Conspiracy
and Protec-
tion of Pro-
perty Act,
1875—88 & 89
Vict. c. 86,
ss. 8, 7 (1).

CONNOR v. KENT.

This was a case stated by the Recorder of Newcastle-on-Tyne on the appeal of Thomas Connor, who had been convicted and fined by two of the justices of the aforesaid town for having intimidated the respondent contrary to the statute 38 & 39 Vict. c. 86, s. 7. The Recorder confirmed the conviction, and in the case which he stated for the Court it appeared that he allowed the appellant at the hearing before him to be examined and cross-examined. The Recorder found certain facts which he set forth, and it appeared from the case stated that his reasons for such findings were grounded to some extent upon the evidence thus admitted. The question of law for the opinion of the Court was "whether upon the said facts stated and found the appellant, Thomas Connor, was guilty of intimidation within the meaning of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 7." If the court should be of opinion that he decided rightly, the said conviction was to stand; but if the court should be of opinion otherwise, then the said conviction was to be quashed.

Poland, Q.C. (Forrest Fulton and R. J. Neville with him), for the respondent, pointed out to the court that by sect. 11 of the Conspiracy and Protection of Property Act, 1875, only persons indicted or informed against under sub-sects. 4, 5, and 6, shall be deemed and considered competent witnesses upon their own trial.

Lawson Walton, Q.C. and Askew, for the appellant, were not called upon.

The Court held that, as it appeared upon the face of the case, that the recorder had allowed an incompetent witness to be examined and cross-examined, and that such evidence formed part of the grounds upon which he had founded his judgment, the conviction was wrong and must be quashed.

GIBSON v. LAWSON.

This was an appeal by way of special case under the provisions of the Summary Jurisdiction Act, 1879, from a decision of the justices of the peace for Tynemouth in the county of Northumberland.

The case stated the facts as follows:—"That the appellant, the

said Robert William Gibson, on the 3rd day of December last was employed as a fitter in the Howdon yard in the said county of Northumberland of Messrs. Palmer and Co. Limited, iron shipbuilders, and had been so employed for eight and a half months previously. That the respondent was also employed as a fitter in the same yard. The appellant was and had been for eighteen months a member of the National United Trade Society of Engineers (which society is hereinafter referred to as 'the National Society'). The respondent was a member of the Amalgamated Society of Engineers (which society is hereinafter referred to as 'the Amalgamated Society'), and he was one of that society's shop delegates. On the 3rd day of December, 1890, a meeting of the Amalgamated Society's local members was held, when it was resolved that they would not work at Messrs. Palmer and Co.'s after the 6th day of December unless the appellant joined their society. The respondent as such delegate communicated this resolution to Armstrong Bessford, shop foreman for Messrs. Palmer and Co. at the said Howdon yard, who subsequently made a statement to the appellant to the effect that the respondent had intimated to him that unless he, the appellant, left the National Society and joined the Amalgamated Society all the members of the Amalgamated Society employed at the works would 'strike him out,' meaning thereby that they would all turn out and refuse to work with the appellant unless and until he became a member of the Amalgamated Society. The appellant thereupon had an interview with Mr. Hill, the shipyard manager of Messrs. Palmer's Howdon and Jarrow yards, who repeated the statement made by Mr. Bessford the foreman. On Friday, the 5th day of December, 1890, the appellant went to the respondent and said to him 'I suppose the Amalgamated men held a meeting about me yesterday; what are they going to do?' The respondent replied, 'You'll have to leave the society you are in, or we'll have you struck out.' The appellant said, 'Will they let it stand over until Monday until I see my society?' and the respondent replied, 'Let yourself run out of compliance with your society and they will have no claim on you.' The respondent, as such delegate of the Amalgamated Society, at that interview refused to wait until Monday, stating that he would give the appellant until breakfast time on Saturday, the 6th day of December, to make his mind up. The appellant thereupon refused to join the Amalgamated Society, and on Saturday, the 6th day of December, 1890, was paid off by Armstrong Bessford to save a strike. It was proved before us that no notice was required on either side to terminate the contract of service between the fitters and their employers at Messrs. Palmer's works. No violence or threats of violence to person or property were used to the appellant, but he swore he was afraid, because of what respondent had said, that he would lose his work and not get employment at either the Howdon or the Jarrow yards, or anywhere where the Amal-

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gamated Society predominated numerically over his own society. The said Armstrong Bessford, the foreman of the said Howdon yard, proved before us that on the 3rd day of December, 1890, the respondent as such delegate informed him that the men of the Amalgamated Society had held a meeting and resolved not to work any longer with the appellant unless he joined their society, and that in consequence of this he reported to James Stephenson, the head foreman fitter, what the respondent had told him. The said James Stephenson stated in evidence that on the 3rd day of December, 1890, he interviewed the respondent and asked him what complaint the men had against the appellant, and the respondent replied that the Amalgamated men had had a meeting, and had decided to come out on strike if the defendant did not conform to their wishes, as they considered that he ought to be in the Amalgamated Society, owing to his being under forty years of age, and that if he did not do so they would come out on strike on Monday. James Stephenson thereupon gave the appellant till 9 o'clock on Saturday morning to make up his mind whether he would join the Amalgamated Society, and told him that if he did not do so so he would pay him off; and, as the appellant did not join that society, James Stephenson paid him off, in order to save a strike. Mr. Hill, the shipyard manager of the Howdon and Jarrow yards, said in evidence before us that, in consequence of what James Stephenson communicated to him, he sent for the respondent, and afterwards left the matter in the hands of Stephenson to deal with. This was all the evidence offered on behalf of the appellant, and was practically admitted by the respondent. It was contended on behalf of the respondent that there was no evidence of intimidation against the appellant within the meaning of the said Act of Parliament; that intimidation must be a threat to do violence either to the person or property of the person intimidated; and that intimidation had been so defined by Cave, J. in a recent case of *Keeler v. M'Kevitt*, tried at Liverpool Assizes in December last (the only report of this case produced to us was in a newspaper called the *Liverpool Mercury*, issued on the 17th day of December last); that sect. 3 of the Act under which this present prosecution was brought provided that an agreement or combination by two or more persons to do, or procure to be done, any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person be not punishable as a crime. It was further contended that, if it was not illegal for one man to go to his employer and say that if a non-unionist continued to work in the yard he would leave his employment, it was not illegal for a body of men to inform their employer through a delegate (as in this case) to do the same thing. For the appellant the case of *Judge v. Bennett* (52 J. P. 247) was quoted, and it was contended that, if the threat used in this case was such as inspired the appellant with reasonable fear tha

he would lose his employment, it would be sufficient to establish the charge of intimidation, and that the evidence adduced amounted to intimidation. We found that in point of law there was no evidence of intimidation against the appellant in this case; that the men had only done in combination what they had a right to do as individuals, and that they were within their rights in acting as they had done; and that, as they had the right to leave their employ without notice, the mere fact that they stated their reasons did not render their action illegal. We further considered upon the evidence before us that this was not an act done in contemplation or furtherance of a trade dispute between employers and workmen within the meaning of sect. 3 of the said Act, but was a dispute between two societies of workmen. For these reasons we dismissed the summons. The appellant is dissatisfied with this decision as erroneous in point of law, and has asked us to state a case for the opinion of the Superior Court. The question upon which the opinion of the Court is requested is, whether we, the said justices, upon the above statement of facts, came to a correct decision in point of law, and whether the respondent was guilty of intimidation within the meaning of the section under which he was charged; and, if not, what should be done in the premises."

Poland, Q.C. (with him *Simey*) for the appellant, argued that the respondent should have been convicted. This case raised the important question of law whether, within the Act, intimidation must be taken to be limited to threats of violence or injury to persons or property. The justices held that he was not shown to have intimidated within the meaning of the section because he had not used threats of violence to the person or property of the appellant. It is submitted that the word "intimidation" must not be confined within this limited meaning. "Intimidation" is an ordinary English word, and must be taken in its ordinary meaning: (*Reg. v. Rowlands and others*, 2 Denison's Crown Cases, 364.) The Imperial Dictionary says the word signifies "to make fearful; to inspire with fear; to dishearten; to cow; to deter by threats." In *O'Connell and others v. The Queen* (11 Cl. & F. 155), Tindal, C.J., at p. 235, says: "The word intimidation is not a technical word; it is not *vocabulum artis*, having a necessary meaning in a bad sense; it is a word in common use." There is nothing, therefore, to limit it to threats of violence or corporeal injury. It is enough if it would affect the mind of a man of ordinary firmness of character. [MATHEW, J.—Must it not be a menace to deprive him of a right?] Not necessarily so. It is enough if it interferes with the exercise of a man's free will. In this case, however, the respondent was shown to have in effect threatened to deprive the appellant of the means of earning a living. Such a threat might be expected to influence a person of ordinary strength of will. [CAVE, J.—The justices appear to have followed my ruling in *Reg. v. McKeenit* (tried at Liverpool Assizes, the 16th day of December, 1890, but not

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reported), which was, that to constitute intimidation within the meaning of this section personal violence must be threatened.] Surely a threat to accuse a man of a crime in order to compel him to do a certain thing would be intimidation; a threat by a member of a trade union to blow up a workman's house. [CAVE, J.—The question is, whether it is intimidation within the meaning of the Act.] The expression "menaces" in other statutes has not been construed as limited to threats of personal violence. The offence of demanding money under 7 & 8 Geo. 4, c. 29, and 24 & 25 Vict. c. 96, s. 45, has been held to extend to a threat to charge a clergyman with immorality: (*Rea v. Southerton*, 6 East, 126; *Reg. v. Miard*, 1 Cox C. C. 22.) In *Reg. v. Walton* (Leigh & Cave's C.C. 288) it was laid down that, to constitute the offence of demanding money with menaces, the menaces must be such as to cause such alarm as would intimidate and unsettle the mind of the person threatened, and that it need not be confined to fear of bodily injury. [CAVE, J.—This Act has an altogether different scope from those general statutes. It must be construed with reference to its particular object and the history of legislation with reference to trade unions.] In *Judge v. Bennett* (52 J. P. 247) it was held that a threat to "picket" was intimidation. This was an express decision that a letter containing a threat to picket may amount to intimidation within this section. [MATHEW, J.—That case would seem merely to have decided that a threat to do something specifically prohibited by the statute, if it in fact intimidates, is intimidation.] The Court said "intimidation" meant any kind of threat provided it made the party afraid. And, again, "intimidation is not exclusively to threaten violence." Either this enactment is limited to threats of violence to the person or property, or it is not. If it be so, where are the words which so limit it; and, if not, where can an arbitrary line be drawn? [CAVE, J.—In the Act of 1871 it was limited to violence to the person or property. Is the present Act to be construed more largely?] The Act of 1875 repeals the Act of 1871 (34 & 35 Vict. c. 32), s. 1, sub-sect. 2, of which makes it an offence to "threaten or intimidate any person in such a manner as would justify a magistrate in binding over the person so threatening or intimidating to keep the peace." It is true the respondent could not have been convicted under this section, as he could not have been bound over to keep the peace except for threats of personal violence. But, as this limitation, together with the rest of the Act of 1871 is repealed by the Act of 1875, "intimidation" in the latter Act must be taken to bear the same meaning that the cases decided show it bore in the earlier Act (6 Geo. 4, c. 129), which made it an offence, "by violence to persons or property, or by threats or intimidation, to endeavour to force a man to depart from his hiring." *Walsby v. Anley* (30 L. J. 121, M. C.), *O'Neill v. Longman* (4 B. & S. 376), *Wood v. Bowron* (36 L. J. 5, M. C.), show that the respondent could have been indicted under that Act for illegally combining with

other workmen to coerce the appellant by threats, though he did not use or threaten violence. [MATHEW, J.—On the ground that the combination amounted to a conspiracy in restraint of trade. COLERIDGE, C.J.—Have not workmen a right to go to their master and say they will not work with certain other workmen, with the result that those others are discharged?] If the object be to force the master to dismiss another workman it is a conspiracy at common law: *Wood v. Bowron* (36 L. J. 5, M. C.); *Shelbourne v. Oliver* (30 J. P. 213); *Skinner v. Kitch* (36 L. J. 116, M. C.; L. Rep. 2 Q. B. 393.) In those cases such combinations were held to be threats and intimidation. Then came the later Act. [CAVE, J.—The Act of 1875 was not intended to increase the stringency of the law. It was preceded by a royal commission which recommended a relaxation of the law in favour of trade unions.] The respondent had acted wrongfully. His act was, in law, a malicious act, done to drive a workman out of his employment unless he would leave his own union and join another. Although trade unions have been declared to be legal associations, still it is illegal for a member of one to combine with other members to coerce a man into joining the union by threatening to prevent his obtaining employment if he does not do so: (*Mogul Steamship v. McGregor*, 61 L. T. Rep. N. S. 820; 23 Q. B. Div. 598; *Hilton v. Eckersley*, 6 E. & B. 47; *Hornby v. Close*, L. Rep. 2 Q. B. 153; *Farrer v. Olose*, 20 L. T. Rep. N. S. 802; L. Rep. 4 Q. B. 602; *Rigby v. Connol*, 42 L. T. Rep. N. S. 139; *Mineral Water Bottle Exchange and Trade Society v. Booth*, 57 L. T. Rep. N. S. 573; L. Rep. 36 Ch. Div. 465.) In the present case the respondent took part in an unlawful combination, and is liable to be indicted for conspiracy. The law as laid down in *Reg. v. Druitt* (10 Cox C. C. 592); *Reg. v. Shepperd* (11 Cox. C. C. 325); and *Reg. v. Bunn* (12 Cox C. C. 316) is still good. This was a case of deliberate conspiracy to coerce the master to dismiss a workman merely for declining to do an act he had a right to refuse to do. That was a conspiracy to ruin or injure a man, and therefore was a criminal conspiracy. The magistrates, therefore, were wrong in their view of the law, and the case should go back to them.

J. Lawson Walton, Q.C. (*Hedderwick* with him) appeared for the respondent.—The decision of the magistrates was right. The respondent was not guilty of “wrongfully intimidating” the appellant within the meaning of sect. 7. “Intimidation” is clearly limited to a threat of violence to person or property creating a reasonable fear. No such violence was threatened in this case, and it is submitted that a combination of workmen with a view of imposing certain restrictions on employers is perfectly lawful. It is neither “wrongful” nor “intimidation.” The definition of the term “intimidation” in the dictionaries is far too wide, and, as to the term “menace,” in other Acts of Parliament, that is quite a different thing. In obtaining money by menace, the offence was robbery, and it was made an offence

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so to obtain money. *Judge v. Bennett* (52 J. P. 247) was the only direct authority on the present case under the last Act. There, however, there was a threat of an unlawful act, the picketing there being an illegal picketing, and there was an apprehension of physical molestation which did not exist in the present case. The sub-sections of sect. 7 refer to threats of physical injury alone. If it had been intended in this Act to make notice of a combination to refuse to work with a particular workman statutory intimidation, there would have been a specific enactment to this effect. It is submitted that, even though there may be a condition of fear in the mind of the person alleged to be intimidated, yet, there would be no breach of the law unless the intimidation were the result of an unlawful act. In *Walsby v. Anley* (30 L. J. 121, M. C.) and other cases on the words "threats or intimidation" in sect. 3 of 6 Geo. 4, c. 129, trade unions were then illegal associations as being in restraint of trade. This disability was removed by the Trade Union Act, 1871 (34 & 35 Vict. c. 81), ss. 1 and 2, and in the same year 34 & 35 Vict. c. 32 was passed, by sect. 1 of which "threatening or intimidating" was limited to such cases of violence as would render the aggressor liable to be bound over to keep the peace, while acts done in restraint were declared to be no longer criminally punishable. It was said the respondent could be indicted for a conspiracy at common law; but that could not be maintained after the Act of 1871. There had been progressive relaxation in these Acts, and it could not be supposed that the Legislature intended to extend by the Act of 1875 the meaning of the word "intimidation." This was a trade dispute within the Act of 1871, and so the magistrates were right in not convicting, there being no illegality and no criminal offence.

CURRAN v. TRELEAVEN.

This was a case stated by the Recorder of Plymouth upon the appeal of Pete Curran, who had been convicted at the petty sessions of "wrongfully and without legal authority intimidating" George Frederick Treleaven, within the meaning of sect. 7, subsect. 1, of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86).

Appeals by George Shephard and John William Matthews, who had been convicted at the petty sessions of the same offence, were heard at the same time. The magistrates sentenced each defendant to a fine of 20l., or in default to six weeks' imprisonment with hard labour.

The case stated by the Recorder was as follows:—"The prosecutor, Mr. Treleaven, is a coal merchant carrying on business in Plymouth, and in the course of his business has to provide for the unloading of ships chartered by him. At the time of the acts in question he was unloading four ships, each with a gang of four men. Three of these gangs consisted of men who were members of one or other of the trade unions to be

hereinafter mentioned. The other consisted of men who were not connected with any union, and they were unloading a ship called the *Ocean Queen*. The gangs of men were, in each case, engaged upon the terms that they should complete the unloading of the ships at a given price per ton of coal unloaded. The defendant was the secretary of the National Union of Gas Workers and General Labourers of Great Britain and Ireland; George Shephard was the secretary of the Dock, Wharf, Riverside, and General Labourers' Union of Great Britain and Ireland; and John William Matthews was the secretary of the Bristol, West of England, and South Wales Operative Trade and Provident Society. Each of these trade unions was duly registered under the Trade Union Act of 1871, and they were the three trade unions which had branches in the borough of Plymouth. On the 9th day of October, 1890, the defendant, with the said Shephard and Matthews, called upon the prosecutor, who, being aware of their intention to come, had arranged for the presence of reporters, and asked him not to employ non-union men, and told him (*inter alia*) that if he continued to do so the unions would combine to prevent his business going on. No conclusion was arrived at that day, but it was arranged that in the meantime the gang of non-union men should complete the unloading of the *Ocean Queen*, and that the prosecutor should employ only union men on his other ships. On the 14th day of October the unloading of the *Ocean Queen* was completed, and the defendant and Shephard and Matthews again met the prosecutor at his office in the presence of reporters. The prosecutor stated that he had decided not to bind himself to employ only union men, though he had no hostility to the unions; that he should treat all men alike, whether union men or not. He also stated that he had been advised that the defendant had committed an offence by the threat he had used on the 9th; but in the interests of peace, he should take no proceedings if no further steps were taken by defendant. The defendant repeated his statement that the unions would combine to prevent the prosecutor's business going on unless he consented to employ only union men. The defendant further said that the funds of the union were in a good condition, and would be used to prevent his employing non-union men. The prosecutor also on the 14th engaged the four non-union men to unload a ship called the *Canada*, and they commenced to unload it on the morning of the 15th. On the 15th day of October the defendant and Shephard and Matthews came to the wharf at which two of the prosecutor's ships were unloading, and, having asked him to be present, said in his hearing and that of his workmen and others who were assembled on the wharf, 'Inasmuch as Mr. Treleaven still insists on employing non-union men, we, your officials, call upon all union men to leave their work. Use no violence, use no immoderate language, but quietly cease to work and go home.' The orders thus given were obeyed, and the union men who were

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unloading Mr. Treleaven's ships immediately ceased unloading them, although they had not completed the work they were under contract to perform. The words and act of the defendant above described made the prosecutor afraid that he would suffer serious injury to his business, and consequent loss to himself, through his workmen still refusing, at the request of the defendant, to perform their contracts, and through the defendant and Shephard and Matthews and the unions they represented combining to prevent his obtaining workmen for the future, and so to prevent his business going on. The prosecutor had reasonable grounds for such fear, such as would have influenced any man of ordinary sound judgment and nerves. The defendant used the words and did the acts aforesaid with the intention of producing this fear in the prosecutor's mind, and for this purpose invited him to listen to what he said. His object in producing this fear was to compel him to discharge the non-union men who were working for him. The direct object of the defendant in calling out the men was to injure the business of Mr. Treleaven. It was not because of anything in the terms and conditions of the employment of the men to which the defendant or the men themselves objected that the defendant so called out the men. The employment of the union men was not in any way affected by the employment of a gang of non-union men to unload a different ship from that on which they were working. The union men in leaving their employment at the request of the defendant were, as the defendant knew, breaking their contracts. The defendant did not desire or intend that any personal violence should be used to Mr. Treleaven or his family, or that any injury should be done to his property otherwise than by the injury to his trade above described. But the prosecutor was reasonably afraid that violence might be used to his workmen and injury inflicted on his property by other persons wishing to aid the union in carrying out their intention to prevent his business going on as one indirect result of the defendant's acts and words, though against his wishes and intentions. The defendant had no ill-will to Mr. Treleaven personally, but spoke and acted as he did with the object of obliging all labourers to join the union by making it impossible for them otherwise to obtain employment, and thus obtaining for the unions a monopoly of the labour in the town. For the prosecutor it was contended: (1) That intimidation is, under the statute, not confined to threats of violence to the person or physical injury to property, and that upon this point I was bound by the decision of the Queen's Bench Division in the case of *Judge v. Bennett* (52 J. P. 247); (2) that intimidation is not confined to causing fear of conduct amounting to a criminal offence, but that causing fear of injury by an illegal act may amount to intimidation; (3) that to cause fear with the view of compelling a man to do or abstain from doing what he has a legal right to abstain from doing or to do even by legal acts may be within the statute; (4) that the

words and acts of the defendant caused reasonable fear that the defendant and Shephard and Matthews and the unions of which they were secretaries would pursue to the prosecutor's injury a course of conduct which was illegal, though not criminal, with a view to compel the prosecutor to abstain from doing what he had a legal right to do, viz., to continue to employ non-union men who were working for him; (5) that with regard to intimidation, as with regard to menace, it was a question of fact. It was contended for the defendant: (1) That there could be no intimidation within the Act unless there was a reasonable fear of violence to the person, family, or property of the persons alleged to have been intimidated; (2) that the defendant was guilty of no offence in calling out the men, and could not therefore be guilty of intimidation by occasioning fear by saying that the union would do what they had a legal right to do; (3) that the defendant had a legal right to ask the prosecutor's workmen not to work for a master who employed non-union workmen, and that his conduct and words only amounted to a statement that he would do so, and was not therefore within the meaning of the Acts. I held, for the reasons given in my judgment, which is appended to, and forms part of this case, that the defendant had committed the offence with which he was charged, and I confirmed the conviction, and ordered the defendants to pay the costs of the appeal. The question for the court is, whether the defendant was lawfully convicted. If he was, my judgment is to be confirmed; if he was not, my order and the order appealed from are to be quashed."

The defendants were separately convicted, and the case of Curran alone was argued, the other two to abide the result.

The case was accompanied by a printed copy of the Recorder's judgment.

In his judgment the Recorder held that, though an agreement by the defendants to strike for their own benefit might be lawful, an agreement by them to strike for the express purpose of injuring the business of the prosecutor was unlawful, as appeared from the *Mogul Steamship Company v. McGregor* (61 L. T. Rep. N. S. 820; 23 Q. B. Div. 598).

Sir H. James, Q.C. (with him Besley) appeared for the appellant Curran to argue that the convictions were wrong.—The defendants, members of a trades union, were desirous of preventing the prosecutor, their employer, from employing non-union men, and the only effect of their intimation, that if he did so they would not work for him, involved no threat of personal violence or physical injury, or injury to property, or any loss or damage beyond loss of money; and as to the possibility of injury in a future strike, it was too remote to come into consideration. The present case was a dispute between workmen and their employer. It was not a criminal offence for the men to leave their work without notice. Curran could not be convicted of any criminal offence, therefore he comes within the protection

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of the Act of 1875. This was the precise case the proviso in the Act was intended to meet and provide for, and, if the circumstances under which the section became law could be stated, it would appear that it was framed with the express view of rendering such a conviction as this impossible: (*Vide* Hansard's Parliamentary Debates, 3rd series, vol. 226, pp. 32-39; pp. 163-169; pp. 709-717.) The "intimidation" intended in sect. 3, sub-sect. 1, is a threat of personal violence. A mere threat of injury to business was not "intimidation" within the Act.

Every strike must injure a business more or less, and the mere threat of a strike may intimidate people, yet a strike is lawful. Was the mere announcement then of an intended strike to be an offense? This conviction, if upheld, would make all strikes unlawful, and would reduce the Act to an absurdity.

Poland, Q.C. (*Duke* with him) appeared for the respondent, and argued in reply for the appellant in *Gibson v. Lawson*.

Our. adv. vult.

July 14.—The following written unanimous judgment of the court was delivered by Lord COLERIDGE, C.J.:—

CONNOR v. KENT.—In this case we are all of opinion that the conviction cannot be sustained, but upon a ground peculiar to this case only; and our judgment upon it can throw no light upon the general and more important questions raised in the other cases which were argued at the same time with this. The Recorder of Newcastle-upon-Tyne, who heard the case, allowed the appellant to be examined and cross-examined, and in the case which he has stated for this Court he has informed us that the appellant's evidence formed part of the grounds on which he formed his judgment. The fact was pointed out to us very properly by Mr. Poland when he came to argue this case before us. We think it is decisive. No statute allows, and certainly the common law forbids, the prisoner to give evidence on such a charge as the one in this case, and it follows that, as the conviction was obtained partly by means of illegal evidence, it cannot be sustained, and must be quashed. It is due to the learned recorder to state that we have been informed, and we do not doubt correctly, that he was misled by the agreement of the counsel before him on both sides that the evidence had been made receivable by statute. So much alteration in this direction has lately taken place in the law, that the belief and acquiescence of the recorder is not at all to be wondered at. In fact, however, the law has not yet been thus altered, the recorder was very naturally misled, but the consequence of his mistake is necessarily that to which we have already given expression.

GIBSON v. LAWSON.—The next case to be considered is that of *Gibson v. Lawson*, in which the circumstances are peculiar, and in which, the magistrates having dismissed the charges, the appeal is against the dismissal of the prisoners, a course no doubt open to the appellant under 42 & 43 Vict. c. 49, s. 33, the Summary Jurisdiction Act, 1879. This summons was under

38 & 39 Vict. c. 86, s. 7, and charged in substance that the respondent unlawfully intimidated the appellant. The respondent was employed as a fitter in the yard of an iron shipbuilding company. The appellant was employed in the same capacity in the same yard. The respondent was member of a society called the Amalgamated Society; the appellant was a member of a society called the National Society. On the 3rd day of December, 1890, a meeting of the Amalgamated Society was held, at which it was resolved that the members of that society should strike unless the appellant left his society and joined theirs. The respondent communicated this resolution to the foreman of the shipbuilding company, who communicated it to the appellant. Thereupon the appellant had an interview with the respondent. In the result the respondent informed the appellant that the Amalgamated Society were determined to carry their resolution into effect, but gave him till the morning of Saturday, the 6th day of December, to make up his mind. The appellant adhered to his own society, and the shipbuilding company, in order to avoid a strike, dismissed him from their yard. It is expressly found in the case that no violence or threats of violence to person or property were used to the appellant; but he swore "that he was afraid, because of what the respondent had said, that he would lose his work, and would not get employment anywhere, where the Amalgamated Society predominated numerically over his own society." These are the whole material facts, and on these facts the magistrates dismissed the summons, and we think rightly. The summons was issued, as has been already stated, under 38 & 39 Vict. c. 86, s. 7. The 3rd section of that Act distinctly legalises strikes in the broadest terms, subject to the exceptions enumerated in the 4th and 5th sections, which immediately follow, and are almost in the nature of provisos upon the 3rd. The 6th section is on a subject altogether alien from the present question; and then comes the 7th, on which we have to decide. It is true that the Act before us is one of a series of Acts dealing with subjects the same as or cognate to those dealt with in the Act itself. Many of these are expressly repealed by the 17th section, and amongst them 34 & 35 Vict. c. 32, is wholly repealed. The 34 & 35 Vict. was passed in 1871, after therefore the charge to the jury by the present Lord Bramwell in *Reg. v. Druitt* (10 Cox C. C. 592), which was delivered in 1867. Whether the Act was produced by the charge it is profitless to inquire; the last proviso of the sub-section is plainly inconsistent with the language of Crompton and Hill, JJ., who in *Hilton v. Eckersley and Walsby v. Anley* (6 E. & B. 47; 24 L. J. 353, Q. B.; 30 L. J. 121, M. C.) had, the one declared, and the other suggested, that strikes were *per se* crimes at common law; and still further with the somewhat rhetorical language of Sir William Erle, who describes a strike "as the power of evil in remorseless activity, destroying those relations between employers and employed on which comfort and

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peace depend, bringing guilt and misery on the workmen, and ruin on their employers:” (Erle on Trade Unions, p. 85.) This statute of 34 & 35 Vict. c. 32, is not indeed conceived in any weak spirit of tenderness to workmen, but the 2nd sub-section of the 1st section limits “intimidation” in that sub-section to such intimidation as would justify a magistrate in binding over the intimidator to keep the peace towards the person intimidated; in other words, to such intimidation as implies a threat of personal violence. Of such intimidation there is in this case no evidence whatever; but it is truly said that this statute is repealed, and is of importance only so far as its object and language may throw light upon the existing statute, the statute under which the summons was issued. It seems clear, however, that, looking at the course of legislation, and keeping in mind the changing temper of the times on this subject, the word “intimidate” in the 7th section of the later Act cannot reasonably be construed in a wider or severer sense than the same word in the 2nd sub-section of the 1st section of the earlier Act. Intimidate is not, as has been often said by judges of authority, a term of art; it is a word of common speech and every-day use, and it must receive, therefore, a reasonable and sensible interpretation, according to the circumstances of the case as they arise from time to time. We do not propose to attempt an exhaustive definition of the word, nor a complete enumeration of the cases to which it may be properly, nor of those to which it may be improperly, applied. It is enough for us to say that in this case it appears to us all there was nothing which under any reasonable construction of the word intimidate could be brought within it. Whether the action of the Amalgamated Society was morally right or not, is a matter on which we express no opinion, because it is not the question before us. It seems to us it was not illegal within the words of the Act of Parliament under which the summons was issued. This, however, does not entirely dispose of the question, for we were very properly reminded of the cases of *Reg v. Druiitt* (10 Cox C. C. 592) and *Reg. v. Bunn* (12 Cox C. C. 36), in which Lord Bramwell and Lord Esher are both said to have held that the statutes on the subject have in no way interfered with or altered the common law, and that strikes and combinations expressly legalised by statute may yet be treated as indictable conspiracies at common law, and may be punished by imprisonment with hard labour. Neither of these cases is very satisfactorily reported; in neither was there any motive for questioning the dicta of the judges; in the one tried by Lord Esher, then Brett, J., there was no opportunity, in consequence of the prisoner having been acquitted on all the counts to which the alleged ruling applied. We are well aware of the great authority of the judges by whom the two cases above mentioned were decided, but we are unable to concur in these dicta, and, speaking with all deference, we think they are not law. It seems to us that to

hold that the very same acts which are expressly legalised by statute remain nevertheless crimes punishable by the common law, is contrary to good sense and elementary principle, and that the reports, therefore, cannot be correct. If the dicta are law they render the statutes passed on these subjects practically inoperative; the statutes might as well not have been passed. The dicta are criticised in detail and with great ability in Wright, J.'s excellent work on the Law of Criminal Conspiracies and Agreements, pp. 50-59. It is difficult to withhold assent from the statements and reasonings contained in these pages, and it seems to us that the law concerning agreements or combinations in reference to trade disputes is contained in 38 & 39 Vict. c. 86, and in the statutes referred to in it, and that acts which are not indictable under that statute are not now, if indeed they ever were, indictable at common law.

CURRAN v. TRELEAVEN.—There remains to be considered only the case of *Curran v. Treleaven*, in which the Recorder of Plymouth affirmed a conviction of magistrates who had convicted the secretaries of three trades unions in Plymouth for having intimidated Mr. Treleaven, a shipowner in that town, within the meaning of 38 & 39 Vict. c. 86, s. 7, sub-sect. 1. The circumstances were very much like those of the last case on which we have decided. In order to prevent the employment by Mr. Treleaven of non-union men the three secretaries told Mr. Treleaven that, if he did not cease to employ non-union men, they, the secretaries, would call off from their employment by him all the members of their three respective unions. Mr. Treleaven refused compliance with their demands, and thereupon the secretaries called off their respective union men, who, in obedience to the call, struck work. The facts are stated to us as follows by the learned Recorder in the case which he has submitted to us: "On the 14th Oct. there was a meeting of the unions, at which it was resolved to adopt the course which the defendants at their interview had stated would be adopted, and accordingly, on the 15th, the defendants, in the presence of Mr. Treleaven, whom they had asked to attend, made the following statement to Mr. Treleaven's workmen and others who were assembled at the wharf: 'Inasmuch as Mr. Treleaven still insists on employing non-union men, we, your officials, call upon all union men to leave their work. Use no violence, use no immoderate language, but quietly cease to work and go home.' The orders then given were obeyed, and the union men who were unloading Mr. Treleaven's ships immediately ceased unloading them, although they had not completed the work that they were under contract to perform." He has also found amongst other facts, or rather he has expressed his opinion upon the two following facts or points in these words, amongst other points not necessary to be considered with reference to the particular question of intimidation: "That the defendants did not desire or intend that any personal violence should be used or injury done

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to Mr. Treleaven or his property; that it was not proved that their words or acts were likely, directly, to cause any such violence or injury, although I am of opinion that Mr. Treleaven was not unreasonably afraid that such violence or injury might occur from the action of the members of the union in consequence of the strike, but against the wishes and intention of the defendants; that the defendants had no ill-will against Mr. Treleaven personally, but acted with the object of obliging all the labourers to join the union as a means of getting employment, and of obtaining for the members of the unions a monopoly of the labour of the port as I have described." And he held, as the result of a very careful and able examination of the statutes and authorities, that the facts above stated constituted intimidation within the words of the section, and that the appellants were properly convicted by the magistrates of intimidation. We are unable to agree with him. As we said in an earlier part of the judgment, we do not propose to enter upon an exhaustive enumeration of all the possible acts which do, and of those which do not, constitute intimidation within the section. But we say that to tell an employer that if he employs workmen of a certain sort the workmen of another sort in his employ will be told to leave him; and to tell the men when the employer will not give way to "leave their work, use no violence, use no immoderate language, but quietly cease to work and go home" (we quote the language of the Recorder), this is certainly not intimidation within any reasonable construction of the statute. Two further observations are necessary in order to make our judgment complete and effective. We do not think that the Legislature intended by the change of words in the 1st sub-section of the 7th section of 38 & 39 Vict. c. 86, to send the Courts back to the 6th Geo. 4, c. 129, for an interpretation of the word intimidate, although the later statute of Victoria did repeal 34 & 35 Vict. c. 32, which limited intimidation to cases which would justify a magistrate in binding over to keep the peace. There is, indeed, much to be said for the view entertained by my learned brother Cave, and acted upon by him (as mentioned by the Recorder in his judgment) in a case tried before him at Liverpool (*Reg. v. McKeevit*, Liverpool Assizes, 16th Dec. 1890, unreported), viz., that intimidation in the 38 & 39 Vict. c. 86, must still be limited to threats of personal violence as enacted by the 34 & 35 Vict. c. 32. It may become necessary to decide this point in time to come; it is not now; and we confine ourselves to the negative statement that the 6 Geo. 4, c. 129, is not now on this subject the governing statute. The other point is this: The recorder held that, though an agreement to strike to benefit themselves would be now a lawful agreement, a strike which would have the effect of injuring an employer is illegal and indictable at common law. He cites in support of his view some phrases from the judgments of the Lords Justices in the case of the *Mogul Steamship Company v. McGregor and others*. But with deference he has somewhat misapprehended the point

of those observations. It is true that where the object is injury, if the injury is effected, an action will lie for the malicious conspiracy which has effected it; and therefore it may be that such a conspiracy, if it could be proved in fact, would be indictable. But it was pointed out in some detail by the court of first instance that where the object is to benefit one-self it can seldom, perhaps it can never, be effected without some consequent loss or injury to someone else. In trade, in commerce, even in a profession, what is one man's gain is another's loss; and where the object is not malicious the mere fact that the effect is injurious does not make the agreement either illegal or actionable, and therefore not indictable. The recorder finds in this case that there was no malice in fact, and his finding is inconsistent with the conclusion that the agreement was either criminal or unlawful. For these reasons we are of opinion that the judgment of the Recorder cannot be sustained, that it must accordingly be reversed and the conviction quashed.

Convictions quashed in Connor v. Kent and Curran v. Treleaven. Judgment for the respondent in Gibson v. Lawson.

Solicitor for appellant in *Connor v. Kent*, F. A. K. Doyle, agent for *Dix and Warlow*, Newcastle-upon-Tyne.

Solicitors for respondent in *Connor v. Kent*, *Botterell and Roche*.

Solicitors for appellant in *Gibson v. Lawson*, *Maples, Teesdale, and Co.*, agents for *Lambert*, Gateshead.

Solicitor for respondent in *Gibson v. Lawson*, F. A. K. Doyle, agent for *Dix and Warlow*, Newcastle-upon-Tyne.

Solicitors for appellant in *Curran v. Treleaven*, *Shaen, Roscoe, Massey and Co.*

Solicitors for respondent in *Curran v. Treleaven*, *Law and Worssam*, agents for *Bond and Pearce*, Plymouth.

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QUEEN'S BENCH DIVISION.

Friday, June 12, 1891.

(Before CAVE and CHARLES, JJ.)

SPURLING (app.) v. BANTOFT (resp.) (a)

Market—Penalty for selling tollable articles outside market—“Prescribed limits”—Lease by borough corporation to cattle salesman—Establishment of market by town council as urban authority—Interference with “rights, powers, and privileges”—38 & 39 Vict. c. 55, ss. 166, 167 (Public Health Act, 1875); 10 & 11 Vict. c. 14, ss. 2 and 13 (Markets and Fairs Olausen Act, 1847).

The business of a general auctioneer and cattle salesman was carried on by S. in the borough of Ipswich, in two sale-yards held by him as lessee and under-lessee respectively, under two leases from the corporation containing express covenants for quiet enjoyment.

In December, 1890, the corporation, who were also the urban sanitary authority, opened, under the provisions of the Public Health Act, 1875, and the Markets and Fairs Olausen Act, 1847, a market in the borough with a list of tolls and bye-laws.

In March, 1891, S. was charged under sect. 13 of the Markets and Fairs Olausen Act, 1847, at the borough petty sessions, on two separate informations, with having sold in his sale-yards, outside the market-place, but within the borough, two bullocks and two horses, for which toll was authorised to be taken in the market, and was convicted and fined.

Held, on a case stated, that the conviction was right; that the corporation could not, for their own benefit, deprive themselves as urban sanitary authority of powers given them by statute to be exercised for the public benefit; that S. had no “right, power, or privilege.” within the proviso of sect. 166 of the Public Health Act, 1875; and that the limits prescribed in that section by the words “within their district” were “prescribed limits” within the meaning of sect. 13 of the Markets and Fairs Olausen Act, 1847.

CASES stated under sect. 33 of the Summary Jurisdiction Act, 1879, by magistrates for the borough of Ipswich.

CASE I.

1. The appellant was summarily convicted at petty sessions on

(a) Reported by **MURVIN L. PERL**, Esq., Barrister-at-Law.

the 2nd day of March, 1891, by justices of the borough of Ipswich, and fined 1s. upon an information laid against him (the appellant) by William Bantoft, town clerk, and clerk to the urban sanitary authority of the borough of Ipswich.

2. The charge laid in the said information was, that the appellant, on the 24th day of February last, at the parish of St. Peter, in the borough aforesaid, after the market-place was opened for public use in the said borough, not then being a licensed hawker, unlawfully did sell and expose for sale in a certain place then known as Spurling's Sale-yard, within the limits of the said borough (as defined by the Public Health Act, 1875, with which is incorporated the Markets and Fairs Clauses Act, 1847), but not within the market there established in pursuance of sect. 166 of the first-mentioned Act, and opened for public use within the limits aforesaid, and certified to be completed and fit for public use as and in manner prescribed by the before-mentioned Markets and Fairs Clauses Act, 1847, nor within his own dwelling-place or shop there, certain marketable articles, to wit, two bullocks in respect of which tolls were by or in pursuance of the said Acts duly authorised to be taken in the said market.

3. Upon the hearing of the said information the following facts were either proved or admitted by the respective parties :

(a) By an agreement for granting a building lease, dated the 9th day of November, 1846, the mayor, aldermen, and burgesses of the borough of Ipswich agreed to grant a lease or leases of some thirty acres of corporation land situate within the said borough but on the outskirts of the town, to certain persons or their nominees upon the terms and conditions therein mentioned.

(b) At that time and subsequently down to the year 1856, cattle, sheep, and other animals were usually sold at weekly sales upon land near the centre of the town of Ipswich, belonging to private individuals who collected payments for such use of their land.

(c) In the year 1856 these sales were discontinued, and the said mayor, aldermen, and burgesses erected pens and other accommodation upon land belonging to them, and forming a more suitable site. This land is within the said borough and adjoins the thirty acres comprised in the said agreement of the 9th day of November, 1846, but is divided therefrom by an intervening public highway.

(d) From the year 1856 down to December, 1890, the site thus provided, which is now known as the cattle market, was used for the purposes of weekly sales, and the said mayor, aldermen, and burgesses, or the tenants to whom they from time to time let the same, continued to collect certain charges from all persons using it as a market place. During the greater part of this period, as hereinafter stated, sales of cattle were simultaneously held upon premises of the appellant by himself and his predecessors in title, and no payments were claimed by the corporation in respect of such sales.

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(e) By an indenture of lease dated the 15th day of June, 1864, and made in pursuance of the said agreement of 1846, the said mayor, aldermen, and burgesses leased to the late partner and predecessor in title of the appellant a piece of land forming part of the said thirty acres, and fronting upon the said highway, for a term of fifty-eight years from Michaelmas, 1863, at a yearly rent of 4*l.* 3*s.* 4*d.*, certain sums having been expended thereon (in the erection of good and substantial stables and other buildings), as in the said lease recited, suitable for the appellant's business.

(f) Prior to and at the commencement of the said lease the appellant and his late partner the above-named predecessor in title, were carrying on business on the premises so leased to them as above stated as general auctioneers and cattle salesmen, for which purpose alone the said premises at that time were occupied by them, and from that time down to the present the appellant has occupied and he still occupies the said premises for the purposes of his said business of a general auctioneer and cattle salesman, and the said premises are now known as Spurling's Sale-yard.

(g) In December, 1867, and in November, 1868, the said mayor, aldermen, and burgesses leased certain land adjacent to the afore-said sale-yard, but not forming any part of the said thirty acres, subject to the said agreement of 1846, to one George Philip Freeman, on the terms stated in the leases of these dates, part of such terms being that the said George Philip Freeman should pay to the lessors certain sums of money therein mentioned for all horses, cattle, pigs, and sheep exhibited for sale, or sold on the lands by the said leases respectively demised. In the year 1871, the said George Philip Freeman having become bankrupt, the said mayor, aldermen, and burgesses sold to appellant certain pens and other fixtures which had belonged to the said George Philip Freeman, and had been used by him for sales of cattle, and which said pens and fixtures the appellant erected upon the land so leased to him by the said indenture of the 15th day of June, 1864.

(h) By an indenture of lease, dated the 8th day of August, 1883, the said mayor, aldermen, and burgesses leased to the appellant a further piece of land immediately adjoining the sale-yard afore-said (but not forming part of the thirty acres comprised in the said agreement of 1846), for a term of thirty-one years from Michaelmas, 1882, at a yearly rent of 10*l.*, but the bullocks mentioned in this case were not sold upon the land leased by the said last-mentioned indenture.

(i) The said sale-yard and premises upon which the appellant has expended upwards of 2000*l.* now consist of a brick-built counting-house or offices facing the said highway, and overlooking the cattle market, and of an extensive yard, partly roofed in, but with open sides fitted with pens and other appliances covering a considerable area at the rear of the said offices, all of which erections by the terms of the lease must be

maintained and left for the said mayor, aldermen, and burgesses of the borough of Ipswich, at the expiration of the term. There is no building erected upon the said premises other than the said offices, and the same are used only in the daytime, and for the purposes of the appellant in his business as an auctioneer. No person resides at or sleeps upon the said premises, or ever has resided there.

(k) On the 14th day of August, 1889, the said mayor, aldermen, and burgesses, acting by the council as the urban sanitary authority for the said borough under the Public Health Act, 1875, resolved to establish a market under the provisions of such Act.

(l) At a quarterly meeting of the council of the borough of Ipswich, duly convened and held on the 14th day of May, 1890, it was resolved as follows :

(a) That a lease be granted to the urban sanitary authority of this borough of the cattle market, place, horse-sheds, cattle-lairs, and premises (as now occupied by Mr. O. S. Orriss), for the term of one year from the 24th day of June next, at the rent of 805*l.* for the purposes of the market intended to be established by the urban sanitary authority. The said authority to pay all rates and taxes, and to do all such repairs as may be necessary.

(b) That the council, as the urban sanitary authority of this borough, take from the corporation a lease for one year of the cattle market and premises above mentioned, at the rent of 805*l.* for the purposes of a site for the market intended to be established by them.

(m) On the 6th day of December, 1890, the said urban sanitary authority having expended a large sum in improving the site and equipments of the said cattle market, and having duly advertised their intention so to do, and having obtained a certificate by two justices as to the completion and fitness for the use of the said market, duly opened the same as a cattle market for public use.

(n) Since the opening of the said cattle market (and previously thereto) all the statutory steps necessary to be taken have been duly taken for the establishment and regulation of the said market, and the list of tolls and the bye-laws thereof have been duly made, sanctioned, exhibited, and published in accordance with the provisions of the Public Health Act, 1875, and the Markets and Fairs Clauses Act, 1847.

(o) On the 24th day of February, 1891, being a market day, and the said market being then open for use, the appellant sold at the portion of his sale-yard included in the lease of 1864, within the limits of the said borough but not within the said market there established as aforesaid, two bullocks.

(p) Under the published list of tolls of the said market a toll is authorised to be taken in respect of each bullock using the said market. No toll was paid in respect of the said two bullocks.

4. At the said hearing the following documents were admitted, and shall be taken as and form part of this case: The above-mentioned leases of 1864 and 1883 together with the said agreement of the 9th day of November, 1846, which is recited in the said lease of 1864. There also may be referred to for the purposes

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of this case the following documents: Two indentures of lease dated respectively the 27th day of December, 1867, and the 9th day of November, 1868, and made between the aforesaid mayor, aldermen, and burgesses of Ipswich, and the said George Philip Freeman; the minutes of the meetings of the town council and of the urban sanitary authority of the 14th day of August, 1889, and the 14th day of May, 1890; the reports of the estate committee dated the 7th day of November, 1881, and the 10th day of May, 1890; and the published schedule or list of tolls of the said market.

5. The appellant contends that the conviction was wrong in law on the following grounds:

(a) That he, the appellant, had rights and privileges within the proviso of sect. 166 of the Public Health Act, 1875, with which the market established under that Act could not interfere.

(b) That the corporation was precluded by the aforesaid leases and the covenants therein contained, and by their conduct in relation to the letting of the said land, from demanding in their capacity of urban sanitary authority tolls or penalties in respect of sales conducted by the appellant on the said land, which is the sale-yard now in question.

(c) That the corporation cannot derogate from their own grants under the said leases.

(d) That the sale of the said bullocks was effected by the appellant under his rights as lessee of the corporation, with which the establishment of the market did not interfere.

(e) That the said bullocks sold by him were not sold within the limits of the market, and were not tollable.

6. The respondent contends that the appellant was properly convicted upon the grounds appearing by the premises.

The question for the opinion of the court is whether the appellant was rightly convicted.

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Paragraphs 1, 2, 3 (a), (b), and (c) were the same, with the exception that the charge was for selling two horses, as paragraphs 1, 2, 3 (b), (c), and (d) of Case I.

3. (d) By an agreement for granting a building lease dated the 13th day of March, 1867, and made and expressed to be in substitution for an agreement of the 9th day of November, 1846, the said mayor, aldermen, and burgesses agreed to grant a lease or leases of the residue then unleased of the land comprised in the said agreement of the 9th day of November, 1846, and adjoining the said cattle market, and also within the limits of the borough, and including the premises now used as a sale-yard for horses by the appellant as hereinafter stated, to certain persons or their nominees for seventy-five years from the 29th day of September, 1866, and upon the terms and conditions therein mentioned.

(e) Same as Case I., 3 (g).

(f) By an indenture of lease dated the 16th day of December,

1868, and made in pursuance of the said agreement of the 13th day of March, 1867, the said mayor, aldermen, and burgesses leased the said premises together with other hereditaments containing some 9a. 2r. 9p. in all, to John Chevallier Cobbold, William Pretty, and Alexander Francis Nicolson, for a term of seventy-five years from the 29th day of September, 1866, at a yearly rent of 60*l*.

(g) By an indenture of underlease, dated the 25th day of October, 1882, after reciting (*inter alia*) that the said John Chevallier Cobbold, William Pretty, and Alexander Francis Nicolson, on or about the 26th day of February, 1870, agreed with John Spurling, the late father and partner of the appellant, to grant to him a lease of the hereditaments thereafter described, and the death of the said John Chevallier Cobbold, the said William Pretty, and Alexander Francis Nicolson, demised a plot of land containing forty rods, and forming part of the said premises, to Charles Spurling as surviving executor of the will of the said John Spurling, for the remainder of the said term of seventy-five years, at a yearly rent of 15*l*.

(h) By another indenture of underlease, dated the 26th day of October, 1882, after reciting (*inter alia*) that the said John Chevallier Cobbold, William Pretty, and Alexander Francis Nicolson, in or about the month of September, 1876, agreed with the appellant and his then late partner to grant them a lease of the hereditaments thereafter described, and the death of the said John Chevallier Cobbold, the said William Pretty and Alexander Francis Nicolson demised an adjacent plot of land containing thirty-three and a half rods and thirty-one feet, forming the remainder of the said premises, to the appellant for the remainder of the said term of seventy-five years, at a yearly rent of 10*l*.

(i) By an indenture of assignment, dated the 31st day of October, 1882, the said Charles Spurling assigned the said underlease of the 25th day of October then current to the appellant.

(j) For twelve years prior to the granting of the said underlease of the 25th day of October, 1882, and for six years prior to the granting of the underlease of the 26th day of October, 1882, the appellant and his late partners were carrying on business on the premises thereby respectively demised as general auctioneers and cattle salesmen, and during and since that time he has occupied them, and he still occupies them for the purpose of his said business and for no other purpose, using them more particularly as a sale-yard for horses.

(k) At the date of the granting of the said underleases the appellant or his firm had fitted up the said premises as a public sale-yard for horses, and during his occupation the appellant or his firm had spent upwards of 800*l*. in buildings on the said premises to fit such premises for the purposes of his said business, and which buildings are by the terms of the said under-

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leases to be left for the benefit of the said mayor, aldermen, and burgesses.

(l) The said premises consist of an open sale-yard measuring about seventy-three rods and a half. Upon the said yard are stables built of brick and slate, and horse and cattle pens. There is no dwelling-place or office on the said premises, nor does anyone reside or sleep there, but the same are used only for the purpose of the sales aforesaid. The said premises are situate close to a larger sale-yard also belonging to the appellant, and are distant about 100 yards from the cattle market aforesaid.

(m), (n), (o), (p) same as Case I., 3 (k), (l), (m), (n).

(q) On the 24th day of February, 1891, being a market day, and the said market being then open for use, the appellant sold by auction at his said sale-yard for horses within the limits of the said borough, but not within the said market there established as aforesaid, two horses.

(r) Under the published list of tolls of the said market a toll is authorised to be taken in respect of each horse using the said market. No toll was paid in respect of the said two horses.

4. At the hearing the following documents were admitted, and shall be taken as and form part of this case: Two indentures of underlease dated respectively the 25th and 26th days of October, 1882; the said assignment of the 31st day of October, 1882; the afore-mentioned lease of the 16th day of December, 1868; and the said agreement of the 13th day of March, 1867.

5. There may be referred to also for the purpose of this case: Two indentures of lease dated respectively the 27th day of December, 1867, and the 9th day of November, 1868, and made between the said mayor, aldermen, and burgesses of Ipswich, and George Phillip Freeman, and an agreement dated the 9th day of November, 1846, and made between the said mayor, aldermen, and burgesses of Ipswich, and John Chevallier Cobbold, John Footman, and John Clarke. The published schedule or list of tolls of the said market. The minutes of the meeting of the town council, and of the urban sanitary authority of the 14th day of August, 1889, and the 14th day of May, 1890.

6. The appellant contended that the conviction was bad in law on similar grounds to those relied upon in Case I.

7. The respondent contends that the appellant was properly convicted upon the grounds appearing above. The question for the opinion of the court is whether the appellant was rightly convicted.

By sect. 166 of the Public Health Act, 1875 (38 & 39 Vict. c. 55):

Where an urban authority are a local board or improvement commissioners, they shall have power, with the consent of the owners and ratepayers of their district expressed by resolution passed in manner provided by schedule 3 to this Act, and where the urban authority are a town council, they shall have power, with the consent of two-thirds of their number, to do the following things, or any of them, within their district: to provide a market-place, and construct a market-house, and other con-

veniences, for the purpose of holding markets; to provide houses and places for weighing carts; to make convenient approaches to such market, to provide all such matters and things as may be necessary for the convenient use of such market; to purchase or take on lease land, and public or private rights in markets and tolls for any of the foregoing purposes; to take stallages, rents, and tolls in respect of the use by any person of such market: But no market shall be established in pursuance of this section so as to interfere with any rights, powers, or privileges enjoyed within the district by any person, without his consent.

Sect. 167 provides that the provisions of the Markets and Fairs Clauses Act, 1847, so far as they relate to markets, shall be incorporated with those of the Public Health Act, 1875, and that an urban authority may, with respect to any market belonging to them, make bye-laws for any of the purposes mentioned in sect. 42 of the Markets and Fairs Clauses Act, 1847, so far as those purposes relate to markets, and printed copies of the bye-laws so made shall be conspicuously exhibited in the market.

Sect. 18 of the Markets and Fairs Clauses Act, 1847 (10 Vict. c. 14), provides:

After the market place is opened for public use, every person other than a licensed hawkers, who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorised to be taken in the market, shall for every such offence be liable to a penalty not exceeding 40s.

Finlay, Q.C. (Poyser with him) for the appellant.—The question is whether, having granted these leases for the express purpose, as it is submitted it is found in each case, of cattle sales, the corporation are to be at liberty to prohibit the use of the premises for which they were taken. Sect. 18 of the Markets and Fairs Clauses Act, being a penal clause, must be construed strictly. Under that section a necessary ingredient in the offence is that the sale should take place "within the prescribed limits," and by sect. 2 "prescribed limits" mean the limits "prescribed for that purpose in the special Act." Now, in this case, assuming the Public Health Act to be the "special Act," there are no limits prescribed by sect. 166, within which except in the market, sales of tollable articles shall not take place. That section merely defines what the district shall be which is to be under the urban sanitary authority, and makes the limits of that district the same as those of the borough. [CAVE, J.—It is not necessary to prescribe the limits by any particular form of words. If you can gather from the district what the limits of the markets are, that is quite enough.] Why have they not said in sect. 18, "Within the district for the use of which the market has been provided?" [CAVE, J.—That seems to me exactly what they have said in other words. CHARLES, J.—If this point was a good one, it is singular that in *Fearon v. Mitchell*, 27 L. T. Rep. N. S. 33; L. Rep. 7 Q. B. 690, it was not taken.] The rights acquired by the appellant under these leases from the corporation cannot be affected by the act of the corporation, in another capacity, opening this market. The corporation cannot take away that which they have given by grants in which they expressly covenant for quiet enjoyment.

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[CAVE, J.—I should say that the covenant for quiet enjoyment would not apply here, otherwise you are making a warranty of it. All that such a covenant means is, that you shall not be turned out by the lessor.] It is submitted that the appellant is a person exempted by the proviso in sect. 166 of the Public Health Act. He referred to *Caswell v. Cook* (11 C. B. N. S. 637); *Dennett v. Atherton* (L. Rep. 7 Q. B. 316; 41 L. J. 165 Q. B.); *Shaw v. Stenton* (2 H. & N. 853; 27 L. J. 253 Ex.)

Lumley Smith, Q.C. (*Sherrington* with him) for the respondent. —This power to establish a market is given to the urban sanitary authority for the good of the public whom they represent, and, even if the corporation, for their own benefit, had directly covenanted that they would not put in force the power given them, such a covenant would be against public policy, and would not bind their successors. The doctrine of estoppel cannot be applied to a common informer. To be within the exemption clause of sect. 166, the appellant must be a person having market rights; the corporation at the time these leases were granted had no power to grant any market rights at all, but merely to lease the land. 'I here is an express covenant here for quiet enjoyment, and that being so, there cannot be also an implied covenant for enjoying the premises in any particular manner: (*Line v. Stevenson*, 7 Scott 69; 5 Bing. N. C. 183.) The corporation have not covenanted in any way that they would not establish a market, and they have not derogated from their grant. The limits for the purposes of the market are prescribed by sect. 166 of the Public Health Act, by which, where a town council are also an urban sanitary authority, they can only exercise "within their district" the powers there given to them. He also referred to *Ellis v. Mayor, &c., of Bridgnorth* (8 L. T. Rep. N. S. 668; 32 L. J. 273, C. P.); *Bradlaugh v. Clarke* (48 L. T. Rep. N. S. 681; 8 App. Cas. 354); *Re Stapleford Colliery Company*; *Barrow's case* (14 Ch. Div. 432; 49 L. J. 253, 498, Ch.); *Robinson v. Kilvert* (61 L. T. Rep. N. S. 60; 41 Ch. Div. 88).

Finlay, Q.C. replied.

CAVE, J.—In this case my mind has somewhat fluctuated during the argument. It is said, in the first place, that the market has not been legally established within sect. 166 of the Public Health Act, 1875, because, it is said, the appellant is a person enjoying a right within this district with which the market will interfere, and that it has not been established with his consent. Now, with regard to the case of *Fearon v. Mitchell* (*ubi sup.*), it seems to me to be there settled that the right, power, or privilege which is there referred to, must be a right in the nature of a franchise, and that which it contemplates is that, when a person has got a franchise of a market, whether by demise or otherwise, that franchise is not to be interfered with, as long as it exists, without the consent of the person. Now, no such franchise exists in this case, and I do not think therefore, that those words of the proviso in sect. 166 apply to this particular

case. Then it is said, although that may be so, where the alleged right is one which has been conferred upon the person who claims to exercise it, by persons other than those who have the option given them of establishing the market, yet where the right, however qualified a right it may be—if it is only a right to sell upon a particular definite piece of land, and not to the exclusion of other persons, who may sell on other lands if they can get them—is a right which has been conferred by the corporation, the corporation cannot afterwards interfere with it by setting up a market in derogation of that grant. Now, to that, two answers have been made. In the first place, it is said that the corporation have not granted anything of the kind, that they have not warranted or contracted with Mr. Spurling that he should be at liberty for ever thereafter, without disturbance, to carry on this business of his on this piece of land, and consequently that in establishing the market they have not in any way derogated from their grant. It is said that there is an express covenant for quiet enjoyment, that the express covenant does not cover what has been done here, and that no implied covenant of a similar character can arise, there being an express one. Well now, I have stated that proposition, but at present I am not prepared to express an opinion upon it. I do not desire to express an opinion one way or the other, as to whether the express covenant would include, in the case of an ordinary individual, such an interference as has taken place here. Nor do I express an opinion as to whether the parties are limited to the express covenant for quiet enjoyment, and cannot imply any covenant or warranty other than such as is actually expressed. Another point was taken, which I confess appears to me to be a better answer to the claim made on behalf of the appellant. It is said that the strongest way in which it is possible to put this for the appellant is, that at the time he executed one or other of these leases, the corporation covenanted with Mr. Spurling that they would not establish a market. Now, in point of fact, I do not think there is any ground for saying that with reference to the lease of 1864. But assuming that there is ground for saying that, or anything like it, with regard to the lease of 1883, that seems to me to be the strongest way in which it could possibly be put. The corporation had no power to grant an exclusive right of selling; they admit that. The utmost that they could do would be to covenant that they would not afterwards establish a market in derogation of this grant which it is alleged they made to Mr. Spurling. Supposing, as I say, that had been done, it seems to me that it would have afforded no answer to these proceedings; and for this reason; the power to establish a market is conferred, by sect. 166 of the Public Health Act, upon the urban sanitary authority who in this place also happen to be the corporation, not for their own benefit, and not in order that they may exercise it or refuse to exercise it for any other reason than the

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general benefit of the people. It certainly seems to me that they would not be at liberty to enter into a covenant of that kind for the purpose merely of securing a better rental for the corporate land, and so an advantage to the borough fund. The corporation, of course, has no powers except such as are granted to it by common law or by statute; and this particular power is granted by statute, and it appears to me to be granted for the general welfare of the people, and not in order that the corporation may do what they please, and either enforce or not enforce it according as they can get a *quid pro quo*—a consideration accruing to the borough fund—for enforcing or not enforcing, or establishing or not establishing, this borough market. I do not think that the corporation was at any time in a position to bind their successors by a covenant not to establish a market. It seems to me that at any moment the urban sanitary authority was at liberty to decide for themselves whether, in regard to the existing state of things in the place, it was desirable or not desirable to establish this market; and that they should be guided in doing that, or precluded from doing that, when they thought it would be for the public advantage, because the corporation had previously covenanted not to do it in order to obtain a larger rent for corporate lands, would be the very worst example. As I have said, the power is given to them, not to be exercised for their own benefit, but for the public benefit; and when it is given to them for that purpose it is not open to them to covenant that they will not use it in return for a consideration; and everybody, I think, who deals with them must take notice of their limited powers, and cannot claim to enforce such a covenant. On that ground, it appears to me that, if the case is put on the very strongest ground on which it could be put, the appellant would be without sufficient grounds for repelling this claim for a penalty, and consequently the magistrates were right in their conclusion.

CHARLES, J.—I am of the same opinion. I do not think that the right in this case, which the appellant insists upon possessing is a right within the meaning of the proviso in sect. 166 of the Public Health Act 1875. It appears to me to be clear, from the language of the learned judges in the case of *Fearon v. Mitchell* (*ubi sup.*), that the right which is intended to be reserved by the closing words of that section is a right—if not of absolute franchise of market, at any rate a franchise of market—a right, to use the words of the learned judge, acquired adversely to the rest of the world, and not merely a right on the part of a particular individual to sell goods in a particular place. I cannot think that it makes any difference in the construction which we ought to place upon that proviso that the premises upon which the appellant was exercising his right to sell cattle were leased to him by the corporation; not even if they were leased to him for the purpose of selling cattle. They are a public authority, as my brother Cave has pointed out, and it could never have been

intended that they should refrain from exercising their power, given them for the benefit of the inhabitants of the district, in consequence of their having parted with these particular premises to a particular individual for the specific purpose of selling cattle. It seems to me that the short answer to the case is, that the appellant is not within the proviso. I desire to say one or two words on the points that have been made. First of all, I cannot say that any grant was made by the corporation to the appellant by the deed of 1864, assuming it to be worth anything to the appellant. That deed was made in conformity with an agreement of 1846 to let land to particular persons or their nominees to the extent of, I think, 30,000 $\frac{1}{2}$., and the lease of 1864 was granted in pursuance of that agreement. It does not say a word about the carrying on of the business of selling cattle. It is in the ordinary form of a building lease, containing reference to stables and other buildings, but not containing in the remotest manner any allusion to any particular trade to be carried on upon the premises in question. Then there is a covenant on the part of the corporation for the quiet enjoyment of the premises demised. That cannot assist the appellant. That simply means, as was pointed out by Willes, J. in the case of *Dennett v. Atherton* (*ubi sup.*) a covenant for the security of his enjoyment of the title and possession of the premises, and they cannot guarantee to the tenant that he can lawfully use the land for any particular purpose. So far with regard to the deed of 1864. With regard to the deed of 1883, the facts are somewhat different, because there the corporation do undoubtedly appear to have leased this particular property for the particular purpose, at that time, of the lessee carrying on the business of a cattle dealer. But, even, if that is so, speaking entirely for myself—because my brother has refrained from giving an opinion on this part of the case—I still think that the judgment of Willes, J. in *Dennett v. Atherton* (*ubi sup.*) covers this case, and that the covenant for quiet enjoyment being an express covenant in the deed of 1883, must be limited to securing the tenant in the quiet enjoyment of the title, and possession of the premises. It is not a guarantee that he may lawfully use the premises even for the purpose for which they were primarily granted. That is, however, simply my own expression of opinion. There is one small matter to which my brother Cave did not allude, and perhaps it is scarcely worth mentioning. Mr. Finlay attempted to argue that there were no prescribed limits in this case, and therefore that the penal clause in the Markets and Fairs Clauses Act 1847 had no application, because the penal clause is only to apply within the prescribed limits, and, said he, in the Public Health Act, 1875, there are no limits prescribed. I am clearly of opinion that limits are prescribed by the Public Health Act, 1875, sect. 166 of which gives power to the urban authority to establish a market “within their district,” and that district, in my opinion, is the limit prescribed by the Public Health Act, 1875. For these reasons I

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think that the magistrates in this case were right, and that the appeal must be dismissed.

CAVE, J.—I agree with what my learned brother says about the prescribed limits.

Appeal dismissed.

Solicitors for the appellant, *Aldridge, Thorne, and Morris*, for *Jackaman and Sons*, Ipswich.

Solicitors for the respondent, *Field, Roscos, and Co.*, for *William Bantoft*, Ipswich.

COURT OF APPEAL.

June 15 and July 21, 1891.

(Before LOPES and KAY, JJ.)

REG. v. LERESCHE AND ANOTHER (Justices of Lancashire). (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Husband and wife—Desertion—Separation deed—Refusal to resume cohabitation—Married women (Maintenance in case of desertion) Act, 1886 (49 & 50 Vict. c. 52), s. 1.

A husband cannot "desert" his wife within the meaning of 49 & 50 Vict. c. 52, s. 1, so long as they are living apart under a separation deed.

Upon a husband's breach of a covenant in a separation deed to make his wife an allowance, the wife requested him to resume cohabitation:

Held, that his refusal of the request was not equivalent to "desertion."

THIS was an appeal from the decision of a divisional court (Day and Lawrance, JJ.) refusing to issue a *mandamus* to the justices to call upon them to state a case for the opinion of the court under 20 & 21 Vict. c. 43, s. 4, and 42 & 43 Vict. c. 49.

The following statement of facts is taken from the judgment of Lopes, L.J.:

A husband and wife agreed in 1890 to live apart, and a separation deed was executed reciting this agreement. The husband therein covenanted with the wife and with a trustee in the usual

(a) Reported by ADAM H. BITTLETON, Esq., Barrister-at-Law.

way, that she might live apart, and that he would pay to the trustee 7s. a week for her separate use, and the trustee covenanted that she would not molest the husband.

The husband after a time discontinued the payment of 7s. a week, and on the 12th day of January, 1891, an action was brought against him by the trustee for the arrears.

He suffered judgment to go by default, but did not satisfy the judgment. A judgment summons was taken out, and the husband was ordered to pay the amount of the judgment by instalments. These instalments were not paid, and an order for commitment was made, execution of which was suspended for a time.

On the 6th day of April, 1881, the wife went to the husband's house and asked to be allowed to resume cohabitation with him. He refused, and would not admit her into the house.

On the 24th day of April she took out a summons before the magistrates at Manchester, under sect. 1 of 49 & 50 Vict. c. 52, as "a married woman deserted by her husband," for maintenance. The magistrates ordered him to pay 7s. a week, and refused to state a case for the opinion of the court under 20 & 21 Vict. c. 43, sect. 2 and 42 & 43 Vict. c. 49.

Application was made to the Divisional Court to grant a rule *nisi*, calling upon the magistrates to state a case.

The Divisional Court refused the rule on the ground that the question sought to be raised was not a question of law, but a question of fact, in respect of which the decision of the justices was final and conclusive.

There was then an appeal from the refusal of the Divisional Court to grant a rule *nisi* to the Court of Appeal. The Court granted a rule *nisi*, which now came on for argument.

[It was agreed to treat the case as though a case had been stated by the magistrates, and the only question argued was therefore whether, under the circumstances disclosed by the affidavit of the justices, the husband deserted his wife within the meaning of 49 & 50 Vict. c. 52, s. 1.]

Trevor White for the husband.—In order to constitute desertion there must have been actual cohabitation at the time of the desertion: (*Pape v. Pape*, 20 Q. B. Div. 76; *Reg. v. Birwistle*, 58 L. J. 158, M. C.; *Fitzgerald v. Fitzgerald*, 19 L. T. Rep. N. S. 575; L. Rep. 1 P. & D. 694; *Crabb v. Crabb*, 18 L. T. Rep. N. S. 153; L. Rep. 1 P. & D. 601; *Keech v. Keech*, 19 L. T. Rep. N. S. 462; L. Rep. 1 P. & D. 641). He also referred to 20 & 21 Vict. c. 85; *Ward v. Ward* (27 L. J. 63, P. & M.); *Gatehouse v. Gatehouse* (16 L. T. Rep. N. S. 34; L. Rep. 1 P. & D. 331).

Atherley Jones for the wife.—The refusal by the husband to resume cohabitation with the wife amounts to desertion on his part: (*Dagg v. Dagg*, 47 L. T. Rep. N. S. 132; 7 P. Div. 17.) The nonpayment of the maintenance agreed upon rendered the separation deed void.

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July 21.—The judgment of the Court (Lopes and Kay, L.J.J.) was read by

LOPES, L.J. (after stating the facts as above).—I am of opinion that in this case a question of law did arise in respect of which the magistrates should have stated a case, and that the rule should be made absolute. To avoid the scandal, expense, and delay, which would arise in sending the matter back to the magistrates to state a case, which would go to the Divisional Court, and perhaps cause an appeal to this court, counsel, at our suggestion, agreed to treat the facts which appeared in the affidavit of the magistrates as containing an accurate and sufficient statement of the facts, which should be regarded in all respects as if it were a case stated by the magistrates under the 20 & 21 Vict. c. 43, sect. 4, and 42 & 43 Vict. c. 49. The question whether or not the wife has been deserted by the husband within the meaning of sect. 1 of 49 & 50 Vict. c. 52, is, as a general rule, a question of fact for the justices to determine. A husband deserts his wife if he wilfully absents himself from her society in spite of her wish. Desertion may be inferred from certain acts in one case which in another would not justify the same inference. There must be a deliberate purpose of abandoning the conjugal society. Such abandonment need not be for any specified period. If a husband had quite recently left his wife, stating that he did not intend to return, and was found living with another woman, there would be abundant evidence of desertion upon which the justices could act. To constitute desertion the parties must be living together as man and wife when the desertion takes place. As was said in *Fitzgerald v. Fitzgerald*, desertion implies an active withdrawal from a cohabitation that exists. This brings me to the case now before the court. The husband and wife at the date of the alleged desertion were living apart under a separation deed. Cohabitation had ceased by mutual consent. It was, therefore, impossible that the husband could desert his wife. So far this case is governed by *Pape v. Pape*, with which decision I entirely agree. But it is said that, assuming that there was no desertion up to the time of the wife seeking to resume cohabitation, his refusal to again cohabit with his wife amounted to desertion or constructive desertion. It is clear cohabitation was not resumed. The husband unequivocally refused to cohabit, and would not allow his wife to enter the house. What, then, is the effect of the wife's offer and wish to resume cohabitation, and the husband's refusal? The case of *Fitzgerald v. Fitzgerald* answers this question. It is there said: "If the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, 'desertion' becomes from that moment impossible to either, at least until their common life and home have been resumed. In the meantime either party may have the right to call upon the other to resume their conjugal relations and, if refused, to enforce their resumption; but

such refusal cannot constitute the offence intended by the statute under the name of 'desertion without cause.' " I am of opinion, therefore, that the refusal of the husband to resume cohabitation did not amount to desertion within the statute in question. It follows, therefore, that the decision of the magistrates was wrong.

Appeal allowed.

Solicitors for wife, *Radford and Frankland*, for *Bowden and Walker*, Manchester.

Solicitors for husband, *Chester and Co.*, for *Lawson, Coppock, and Co.*, Manchester.

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OXFORD CIRCUIT.

WORCESTER AUTUMN ASSIZES.

Friday, Nov. 20, 1891.

(Before DAY, J.)

REG. v. BIRD. (a)

Perjury—Indictment—Evidence in support of averment ambiguous. The averment in an indictment for perjury must be proved precisely.

In an indictment for perjury the averment stated that the prisoner swore he saw W. "about fifteen minutes after the hour of eleven o'clock in the forenoon" on a particular day, whereas it was proved that he had sworn that he saw W. about a quarter past eleven on the day in question, but had not sworn as to whether it was in the forenoon or in the afternoon:

Held, that, the evidence being ambiguous, the averment in the indictment was not proved.

THE prisoner, Harry Bird, was indicted for perjury.

The indictment, so far as material, was as follows:—The jurors . . . present that during the hearing of an information it was material to inquire "whether or not the said Harry Bird saw the said James Walker beating an osier bed . . . at about fifteen minutes after the hour of eleven o'clock in the forenoon,"

(a) Reported by EDWARD J. GIBBONS, Esq., Barrister-at-Law.

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on the 9th day of January, and the jurors aforesaid further present that "Harry Bird, on his oath upon the said hearing, unlawfully, falsely, knowingly, wilfully, maliciously, and corruptly did swear to the effect that he saw the said James Walker beating an osier bed . . . at about the time and on the day last aforesaid," whereas in truth and in fact Harry Bird did not see James Walker beating an osier bed "at about the time and on the day last aforesaid," &c.

The magistrates' clerk was called by the prosecution to prove the deposition of Harry Bird at the hearing of the information mentioned in the indictment, and he proved that Bird had sworn he saw Walker beating an osier bed about a quarter past eleven, on the 9th day of January, but Bird had not sworn as to whether it was 11.15 a.m. or 11.15 p.m.

A. Lyttelton, for the defence, contended that the prisoner could not be convicted, inasmuch as the averment in the indictment was not supported by the evidence.

Vachell for the prosecution.—It is a question for the jury as to what the prisoner meant by swearing "that he saw Walker about a quarter past eleven." Having regard to the information and the inquiry then being held, namely, that Walker was charged with poaching and beating an osier bed at 11.15 in the forenoon, the prisoner when he so swore must have meant in the forenoon.

DAY, J.—No doubt there has been an oversight. But I am afraid that I must give effect to the objection, though it is merely a technical one. The evidence given before the magistrates was ambiguous; and there is a variance between that evidence and the indictment. This is a criminal charge, and both the evidence and the averment in the indictment must be identical in order to convict a man of perjury. The learned judge then directed the jury to acquit the prisoner.

Verdict. Not Guilty.

Solicitor for the prosecution, *M. Oorbett*, Kidderminster.

Solicitor for the prisoner, *Thursfield*, Kidderminster.

COURT OF APPEAL.

Nov. 21, 23, 24, 25, and Dec. 5, 1891.

(Before LINDLEY, BOWEN, and FRY, L.JJ.)

JONES v. THE MERIONETHSHIRE PERMANENT BENEFIT BUILDING SOCIETY. (a)

APPEAL FROM THE CHANCERY DIVISION.

Stifling a prosecution — Agreement — Validity — Illegal consideration.

C., the secretary of a building society, misappropriated various sums received by him in that capacity. Upon those frauds coming to the knowledge of the directors of the society, they required C., under threats of criminal proceedings for embezzlement, to make good his defalcations by a specified day. C. then applied to the plaintiffs, who were his relatives, for assistance, and mentioned that he was in danger of being prosecuted. The plaintiffs thereupon gave a written undertaking to the society to make good the greater part of the debt due from C. the expressed consideration being the forbearance of the society to sue him for the amount for which the plaintiffs made themselves responsible. In pursuance of that undertaking the plaintiffs gave two promissory notes to the society, and deposited certain deeds with it as collateral security. The plaintiffs in giving the undertaking were actuated by the desire to prevent the prosecution, and this was known to the directors of the society.

The plaintiffs brought an action against the society for a declaration that the promissory notes and the deposit of deeds were void, on the ground that they were given upon an illegal consideration.

Held, that the consideration for the agreement being the forbearance of the society to take criminal proceedings against C. was illegal; that the agreement which was founded upon it, was therefore void; and the plaintiffs were entitled to succeed in their action.

Decision of Williams, J. (ante, p. 334; 65 L. T. Rep. N. S. 314; (1891) 2 Oh. 587) affirmed.

THE plaintiffs, Thomas Elias Jones and Catherine Jones, his mother, were respectively the brother-in-law and mother-in-law of John Cadwaladr, deceased. They resided at Talysarn, Carnarvonshire.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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The defendants were the Merionethshire Permanent Benefit Building Society, which was incorporated under the Building Societies Act, 1874, and established at Blaenau Festiniog, Merionethshire, in 1877.

This action was brought for a declaration that two joint and several promissory notes signed by the plaintiffs in favour of the defendants, for 200*l.* and 150*l.* respectively, and a deposit of certain title deeds as a collateral security, were void on the ground that they were given for an illegal consideration.

The circumstances under which the promissory notes were given and the deposit was made were the following:—

John Cadwaladr was the secretary of the defendant society from the time of its incorporation until March, 1889, and as such secretary it was a part of his duty to keep the accounts of the society.

Early in 1889 the attention of the directors was called to certain discrepancies in the accounts of the society.

At a board meeting, held on the 26th day of February, 1879, the auditor of the society reported that there was a sum of 149*l.* entered against one John Ellis, a mortgagor of the society, whereas, on the 31st day of December, 1882, a sum of 110*l.* had been paid in discharge of that mortgage, and the mortgage had been discharged by the secretary, and the seal of the society affixed to the discharge on that day.

In obedience to instructions from the directors, the solicitor of the society, G. H. Ellis, demanded an explanation from Cadwaladr, and in answer thereto Cadwaladr stated that he felt sure that the money had never come to his hands, and he undertook to make good the amount.

Early in March, 1889, he paid 110*l.* into the society's bank. After that incident the directors caused a thorough investigation to be made into the account books of the society throughout the whole period of its existence.

The result of the investigation showed that Cadwaladr had received from various persons and omitted to pay over to the society several sums for subscriptions and otherwise, amounting in all (exclusively of the 110*l.*) to 626*l.* 2*s.*

At a board meeting held on the 22nd day of March, after the result of the investigation was known, it was resolved to suspend Cadwaladr from his office of secretary pending further inquiries, and it was further resolved that Cadwaladr should be allowed to inspect the books of the society in the auditor's presence, but not in his absence.

At a board meeting held on the 30th day of March it was resolved that G. H. Ellis should be instructed to prepare securities to cover the amount due from Cadwaladr to the society, and it was further resolved that certain particular securities which were specified in the resolution should be accepted. These securities included the following: "Mother-in-law and brother-in-law as securities for 400*l.*" There was no evidence

as to the circumstances under which the securities were proposed.

At a board meeting held on the 2nd day of April, 1889, it was resolved that Cadwaladr should be allowed until the 6th April, 1889, to pay the sum of 400*l.*, and should be required to give security for 200*l.*

On the 3rd or 4th days of April, 1889, Cadwaladr sent his son to Talysarn to ask the plaintiffs to help him out of his difficulties, but they declined to give him any assistance.

On the 4th day of April, 1889, Cadwaladr's son wrote at his father's dictation to the plaintiff, Thomas Elias Jones, a letter, which was as follows :

Dear Uncle,—After I returned home from you father was greatly disappointed in learning that you would not help him in any way at the present crisis, as he says it is now come to an end with him, as Saturday next, the 6th inst., is the last day the directors have fixed for him to pay the amount specified, and no grace will be got from them, as he says there is nothing to meet him on Saturday night next but the jail if you will not try and do something. Father says the directors are all against him, and he is certain they will begin criminal proceedings on Saturday next. He has offered them every scrap of all he has, but they require 400*l.* more, and he has no other than you and Nain to apply to for help. Try your best and do something for us as children, as if they will take him up none of us can raise our heads up. He is very sorry, but he cannot write himself owing to the bill being unpaid at the bank, and so he has asked me to write for him (and not merely for him, but for all of us). Again I must ask you to try and arrange somehow to help my father out of this extreme crisis, and all of us will be very glad, and it will be to himself and all of us a great blessing. I must now conclude by hoping and trusting you will help us. I am yours faithfully,—J. R. CADWALADR.

On the 5th day of April, 1889, after the receipt of this letter, T. E. Jones went over to Festiniog, and took with him two bill papers signed in blank by his mother, and also a bundle of deeds belonging to his mother.

On the 6th day of April, 1889, T. E. Jones accompanied Cadwaladr to the office of G. H. Ellis, where a board meeting was to be held at four o'clock.

After some time they were called in to the meeting, and T. E. Jones offered on behalf of himself and his mother to pay to the society the sum of 176*l.* 2*s.* in cash, and to secure payment of a further sum of 350*l.* by two promissory notes and the deposit of certain title deeds. That offer was accepted.

The record of the transaction in the minute-book stated that it was "Resolved that the offer made by Mr. Thomas Elias Jones for securing the payment of 526*l.* 2*s.* (part of the amount due from Mr. Cadwaladr to the society) be accepted, on the express condition that Mr. Cadwaladr execute a promissory note for 100*l.*, another part of the amount due from Mr. Cadwaladr."

The minutes went on to state that certain named directors had been requested to complete the transaction with Mr. Cadwaladr's sureties.

In the evening of the same day those directors called at Cadwaladr's house, accompanied by a clerk of G. H. Ellis.

At that interview T. E. Jones signed on behalf of himself and his mother a written undertaking which had been prepared in G. H. Ellis's office since the meeting in the afternoon.

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It was addressed to the society, and was as follows :

In consideration of your not suing Mr. John Cadwaladr, of Blaenau Ffestiniog, chartered accountant, to recover the sum of 526*l.* 2*s.*, being part of a sum of 626*l.* 2*s.*, being the whole amount owing by him to you, we undertake to see you paid the sum of 526*l.* 2*s.* in the manner following, viz., in cash amounting to 176*l.* 2*s.* and the remainder to be secured by two promissory notes (one for 200*l.* and one for 150*l.*), and also interest thereon at the rate of 5 per cent. per annum, to be payable on demand and executed by us.

At the same time T. E. Jones paid over to the directors 176*l.* 2*s.* in cash, and after filling in the bill forms with the dates and the amounts, and adding his signature in compliance with the terms of the undertaking, he handed the complete instruments to the directors.

He also deposited with the directors the deeds which he had brought with him from Talysarn, as collateral security for the sums secured by the promissory notes.

A few days later a duplicate copy of the undertaking was signed by both plaintiffs.

The plaintiffs took security from Cadwaladr for the sum for which they had made themselves responsible to the society.

On the 16th day of July, 1889, Cadwaladr died intestate.

In January, 1890, the society brought two actions in the Queen's Bench Division against the plaintiffs on the promissory notes, but those actions were transferred to the Chancery Division to be tried with the present action upon payment by the plaintiffs to the society of 370*l.*, the society undertaking to repay the amount to the plaintiffs if the court should so order, and upon delivery by the society to the plaintiffs of the deeds deposited with the society as collateral security.

The plaintiffs claimed a declaration that the promissory notes and the collateral security were invalid, and that they were entitled to retain the deeds free from any charge or incumbrance; delivery up of the notes for cancellation; and repayment of the 370*l.* with interest.

The defendants pleaded that the directors had no belief that their secretary had been guilty of fraud, and that they never threatened or intended to take criminal proceedings against him.

The action came on for trial before Williams, J., sitting as an additional judge of the Chancery Division, in May, 1891, when the facts found by his Lordship upon the evidence were as follows: That Cadwaladr had embezzled the funds of the society; that the directors recognised the defaults of Cadwaladr as defaults arising from his criminal use of their funds, and that they threatened to prosecute him; that the threats uttered by the directors were communicated by G. H. Ellis to Cadwaladr's son and also to his sister-in-law, one Mrs. Williams; that the directors had no communication whatever with the plaintiffs in which they mentioned any threats of prosecuting Cadwaladr; that at the board meeting of the 6th day of April, 1889, the directors made no promise in words to the plaintiff, T. E. Jones, that they would not prosecute Cadwaladr; that Cadwaladr in

applying to his relatives for assistance mentioned to them that unless he obtained the requisite sum by a certain day the directors intended to prosecute him; that the plaintiffs in coming forward were actuated by their fear that the directors intended to prosecute; and that their motive was known to the directors.

It was decided by Williams, J. (*ante*, p. 384; 65 L. T. Rep. N. S. 314; (1891) 2 Ch. 587) that it being an implied term of the agreement that there should be no prosecution, the agreement was founded on an illegal consideration and void; and that the plaintiffs were therefore entitled to judgment.

From that decision the defendants now appealed.

Reid, Q.C. and *Haldane*, Q.C. (*W. D. Rawlins* with them) for the appellants.—In order to invalidate the agreement in this case it is necessary for the respondents to establish one of two things: either an actual bargain, not necessarily in writing, by the appellants not to prosecute; or what equity regards as pressure or undue influence. Where a felony has been committed it is not illegal either for the defaulting debtor or for a stranger to enter into an agreement to make good the debtor's default, provided there is no intention on the part of the party to such agreement to stifle a prosecution: (*Ward v. Lloyd*, 7 Scott R. N. 499; 6 Man & G. 785; *Flower v. Sadler*, 10 Q. B. Div. 351.) Here the agreement was legal, as it was quite apart from any such intention. They referred also to *Windhill Local Board of Health v. Vint* (52 L. T. Rep. N. S. 725; 63 L. T. Rep. N. S. 366; 45 Ch. Div. 351; 17 Cox C. C. 41); *Williams v. Bayley* (14 L. T. Rep. N. S. 802; L. Rep. 1 E. & Ir. App. 200); *Taylor v. Chester* (L. Rep. 4 Q. B. 309).

Jelf, Q.C. (*H. Terrell* with him) for the respondents.—The securities were given in consequence of the appellants' threats of criminal proceedings, and are void. I rely on the proposition of law stated by Lord Lyndhurst in *Egerton v. Earl Brounlow* (21 L. T. Rep. N. S. 306; 4 H. of L. Cas. 1, 163), that "any contract or engagement having a tendency, however slight, to affect the administration of justice, is illegal and void." The undertaking in this case was void on the ground that it was given for an illegal consideration, inasmuch as there was a tacit understanding actuating both parties that criminal proceedings should not be taken. It is not necessary to prove an express agreement not to prosecute: (*Lound v. Grimwade*, 59 L. T. Rep. N. S. 168; 39 Ch. Div. 605, 612.) The appellants knew of Cadwaladr's embezzlement and threatened and intended to take criminal proceedings against him, and I say that there was a tacit understanding actuating both parties to the agreement that these criminal proceedings should not be taken. Where a felony has been committed no action can be maintained for a civil debt until the criminal prosecution has first been disposed of. The principle upon which that rule is founded is that the interest of the public requires that the law shall be vindicated before the individual who is wronged shall be permitted to have recourse to a civil

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remedy: (*Appleby v. Franklin*, 54 L. T. Rep. N. S. 135; 17 Q. B. Div. 93).

Reid, Q.C., in reply, referred to *Harrington v. Victoria Graving Dock Company* (3 Q. B. Div. 549).

Cur. adv. vult.

Dec. 5, 1891.—The following judgments were delivered:—

LINDLEY, L.J.—This is an appeal from a judgment of Williams, J. The case comes before us in rather a curious shape, inasmuch as it comprises two actions which are now being tried together. There was an action at law to enforce certain promissory notes. There was an action in the Chancery Division to have those promissory notes and certain securities which were given by the makers of them delivered up to be cancelled. Those two actions were directed to be transferred to come on in the Chancery Division, and an order which I will read was made. It was an order of the 21st Feb. 1890: "On the application of the plaintiffs in this action"—that is, the Chancery action—"the plaintiffs and defendants by their respective counsel consenting to take all necessary steps to obtain the transfer of the actions of *The Merionethshire Benefit Building Society v. Jones* . . . which actions were by order dated the 10th day of February, 1890, consolidated, and which consolidated action is now pending in the Queen's Bench Division of this court" that is, the Chancery Division of the High Court—"and that such action when so transferred should be tried with this action, and the said William Jones, David G. Jones, William Owen, William Morris, John Parry, Andrew Roberts, and John Joseph Jones, the directors of the defendant company, by their counsel undertaking to repay to the plaintiffs the 370*l.* hereinafter mentioned, or such part thereof as this court might think fit, with interest in the event of the plaintiff succeeding in this action, or if this court shall so order; this court doth order that the plaintiffs, Thomas Elias Jones and Catherine Jones (widow) do pay to the defendants the Merionethshire Permanent Benefit Building Society the sum of 370*l.*"—that is, the amount of the notes—"and that thereupon the defendants, the Merionethshire Permanent Benefit Building Society, deliver up to the plaintiffs, Thomas Elias Jones and Catherine Jones (widow), the deeds and documents mentioned in the exhibits . . . referred to in the affidavit of the plaintiff, T. E. Jones, filed the 8th day of February, 1890, and it is ordered that the costs of this motion be reserved." Under those circumstances the case came before Williams, J., and he has decided that the notes in question are invalid, and that those securities ought to be retained by the plaintiffs who gave them, and who have got them under the order to which I have referred. The substantial question under the circumstances is, whether the learned judge was right in holding that those notes were invalid at law, and could not be enforced. The alleged ground of illegality was that they were given pursuant to an agreement to "stifle a prosecution," to put it shortly. I shall content myself

for the moment with reading the findings of Williams, J. without going through the details, and commenting only on one finding which is quarrelled with by the appellants. [†] Williams, J. begins his judgment in this way: "In this case I find, as a fact, that Mr. Cadwaladr did embezzle funds intrusted to him by his employers the building society. I find, as a fact, that the directors knew of this embezzlement, and that they recognised the defaults of Cadwaladr as defaults arising from his criminal use of their funds. Under the circumstances I find that the directors did threaten to prosecute Cadwaladr." That is the only finding of fact which is quarrelled with by the appellants, and I will allude to that a little more by-and-by. Then he goes on thus: "And I further find that these threats which were so uttered to Cadwaladr were communicated by Mr. Ellis to Mr. Williams, and also to young Cadwaladr, but I find that the directors had no communication whatsoever with the plaintiffs, that is to say, with Mr. Elias Jones or Mrs. Jones, in which they mention any threats of prosecution of Cadwaladr; and I also find that the only interview which seems to have taken place between the directors and Mr. Thomas Elias Jones (they do not seem to have had any interview as far as I can make out with Mrs. Jones) that not only was there nothing said by the directors on the subject of the prosecution of Cadwaladr, but also there was no promise in words by the directors that they would not prosecute Cadwaladr. It is because I take this view of the facts that I spoke of the plaintiffs as volunteers, and I still speak of them as volunteers. I think that Cadwaladr, fearing prosecution, applied to his relations. I have no doubt whatever that Cadwaladr mentioned to his relations the fact that if he did not get this money the directors intended to prosecute him, and I have very little doubt that the form of the agreement was to a certain extent affected by this fact that the plaintiffs knew that there was every prospect of prosecution of Cadwaladr if he did not provide the money. I mean this, that I think the plaintiffs at all events were anxious, or Mr. Elias Jones was anxious, that the agreement should be put in such a form as would render it as little likely that Cadwaladr should be sued as might be, and under these circumstances Mr. Ellis, or Mr. Ellis's clerk—Mr. Jones—seemed to have recognized that the relatives might reasonably wish to have the agreement in such a form as would render a prosecution as unlikely as might be, and therefore they had the agreement drawn up in such a shape that it put an end, according to my view, to the indebtedness of Cadwaladr altogether, for the amounts in respect of which Mrs. Jones and Mr. Elias Jones took the responsibility on their shoulders." Now, the learned counsel for the appellants, who argued this case here with great skill and great clearness, did not, as I have already said, quarrel with any of these findings of fact except one. They said that this finding was not right, "I find that the directors did threaten to prosecute Cadwaladr,"

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Now we have looked into the evidence on that point, and a great deal on that particular point must turn upon the view the learned judge took of the truth of what I am going to read from the answers to interrogatories, namely, the answer by the plaintiffs, the Joneses, to the fourth interrogatory. The fourth answer runs thus: "We did not, either of us, previously to the payment and giving on deposit of 165*l.* promissory notes and deeds and documents referred to in paragraph 6 and 7 of the statement of claim, or on the occasion of such payment and giving on deposit, make any inquiry of any of the directors or officers of the defendant society in reference to the prosecution of or taking of any criminal proceedings against the said John Cadwaladr by the defendant society or its directors, but I, the said Thomas Elias Jones, on that occasion"—that is, the 6th day of April, 1889—"referred to a prosecution which had some time before been instituted by the directors of a neighbouring building society against their secretary for similar malpractices to those charged against the said John Cadwaladr, and on which prosecution such secretary was convicted; and referring to such prosecution, I said that if the directors of such building society had had such an offer as I am making they would have jumped at it rather than punish their secretary, and if you, meaning the directors, send Cadwaladr to prison you will get nothing in that way. No one made any reply to such observation. I believe all the directors were present on that occasion." Now that is denied, and a great deal from one point of view turns upon the view taken by the learned judge of the truth of that statement; and having looked at his notes of the evidence, I have come to the conclusion—indeed we have all come to the conclusion—that we must believe that that was true. If that is true, then the only point on his finding of fact which is quarrelled with stands unimpeached, and I take the facts therefore, as correctly found by him in all respects. Upon that basis it is necessary to consider what the true result ought to be. Now first of all, in order to clear the ground, I think it is desirable to refer to the different kinds of proof which have to be given according as the case arises in a court of law or in a court of equity. In the action at law upon the promissory notes the defendants are entitled to plead the illegality of the transaction, and if they can prove it, to obtain judgment. They are not seeking active relief, but although the illegality does not appear on the face of the instrument, it is familiar law that a person can defend himself by pleading illegality. Now what must be shown at law in order to protect himself from paying the notes which he has given? I think the law as to that was very correctly stated long ago by Lord Ellenborough in a case in Campbell's Reports, and although it is a *Nisi Prius* case it is one of those which seems to be so accurately reported by Lord Campbell that I have no hesitation in referring to it. It is the case of *Wallace v. Hardacre* (1 Camp. 45, 46). Lord Ellenborough said this: It was common enough

upon discovering that bank-notes or bills of exchange had been forged to send them back to the persons from whom they have been received, and to get others that were valid in their stead. But it would be too much to say that the consideration for these last was corrupt and illegal, and that they could not be rendered available in the hands of those whose object in getting possession of them was merely to exchange securities that were forged for others that were without this vice. If any bargain could be shown here to stifle a prosecution for a criminal act, the action certainly could not be maintained; but otherwise the mere substitution would not invalidate the plaintiff's right to recover against the acceptor of this bill." That case was decided in the year 1807, and from that down to the present time, so far as I know, the decisions at law are all uniform. That is to say, in order to amount to a defence on the ground of illegality there must be an agreement not to prosecute—an agreement as it is called to "stifle a prosecution." Before I apply that observation to this case I proceed to consider what has to be done in a court of equity. A plaintiff is not entitled to relief in a court of equity on the ground of the illegality of his own conduct; he cannot make his own illegality a ground for relief at all. In order to obtain relief in equity he must prove not only that the transaction is illegal but something more. He must prove either pressure or undue influence. If all that he proves is an illegal agreement he is not entitled to relief. If, on the other hand, he can go further and show pressure or undue influence so as to bring himself within the doctrine applicable to transactions of that kind, then he is entitled to relief in equity although the transaction may be illegal upon the ground that it is meant to stifle a prosecution. That that is so is illustrated by the cases of *Osbaldiston v. Simpson* (18 Sim. 513), and *Williams v. Bayley* (14 L. T. Rep. N. S. 802; L. Rep. 1 E. & I. App. 200) in the House of Lords, where the ground of relief which was obtained in equity was distinctly pressure and threats. Now, in the present case of *Jones v. The Merionethshire Permanent Benefit Building Society* there is no proof—scarcely a trace of evidence even—of pressure or undue influence. The learned judge has not found that, and we cannot find it. Therefore, if it had not been for the order of February, which I have read, I should have thought that the plaintiffs in equity had failed. But that is not the substantial question now. That is admitted. The real substantial question is whether, according to the facts which have been found by the learned judge, he was warranted in coming to the conclusion that there was an agreement not to prosecute. Now there, I confess, it appears to me that he is right. I think upon the finding which I have read that it is impossible to avoid coming to the conclusion not only that these notes were given by the relatives in the expectation that Cadwaladr would not be prosecuted; that alone would not do; that is decided by the case

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which was referred to of *Ward v. Lloyd* (7 Scott N. R. 499 ; 6 Man. & Gr. 785) ; but having regard to those findings I cannot myself avoid inferring as a fact that these securities were given for the express purpose of preventing a prosecution of Cadwaladr ; that the purpose was perfectly well known to the directors ; and that the whole negotiation proceeded upon the basis. In other words, I cannot avoid coming to the conclusion that there was an implied term or condition that the directors should not prosecute ; and that they accepted these notes knowing that, and without dissenting or intimating in any way whatever that they took the notes upon any other conditions, or upon any other terms. It appears to me, therefore, that upon that view of the case it is impossible to disturb the judgment of the learned judge in the court below, and that this appeal must be dismissed. As regards the costs, it is very unusual for this court to dismiss an unsuccessful appeal without costs, but there are grounds here which induce us to do so. The grounds are these : But for the order of February, which I have read, that Chancery action ought to have been dismissed with costs. That order, having regard to the terms of it, we have passed over, and the order of the judge stands in the Chancery action. We are very much struck with the character of the defence to the appeal, and the circumstances under which it was raised. It is an extremely discreditable defence, to which we are compelled to give effect upon grounds of public policy. For these reasons, therefore, the appeal will be dismissed without costs.

BOWEN, L.J.—This case appears to me to be one not free from difficulty, the difficulty arising out of the facts which were proved at the trial, and not from the law, about which I do not suppose very much doubt can be entertained. The cases may be ranged under two heads : first of all, the cases where there is the suggestion of an agreement to “stifle,” as it is called, a prosecution ; and secondly, the cases where there has been that which amounts to pressure or undue influence within the meaning attached to those terms by the court of equity. First of all, with regard to agreements to stifle prosecutions, there is no absolute duty to prosecute an offender in all cases. The duty to prosecute or not to prosecute is a duty which a person owes to society, and which depends on the circumstances of each case. It cannot be said that it is a duty, as I have said before, to prosecute in all cases. The matter depends on moral and civil considerations which vary according to each case. But the person who has to decide, or act, is bound morally to be influenced by no indirect motive. If he prosecutes he must not do so under the influence of the violence of unreasonable anger, of a personal wrong, nor by any motive of obtaining gain for himself. In deciding whether he shall prosecute or not, he must bring a fair and honest mind into consideration, and exercise his decision from a sense of duty to himself and others. What is there in the law affecting this duty ? It is that it shall not be made a matter of private bargain.

"It is to the interest of the public," said Erle, C.J., in the case of *Clubb v. Hutson* (18 C. B. N. S. 414, 417), "that the suppression of a prosecution shall not be made matter of a private bargain." It may be made the matter of private bargain in two ways: first of all, if forbearance to prosecute is promised on condition of the receipt of a particular sum of money or a particular security; secondly, if the forbearance is given in consideration of money or security received. The second class of cases is a class in which there is a private bargain because the security, or the money, is taken upon the terms that it shall be retained if the forbearance is given. Both these classes of cases fall within the rule of Erle, C.J., a rule which is much older than Erle, C.J., but which is tersely put in the case which I have mentioned. The difficulty in practice arises when reparation has been made by the offender. I put aside the somewhat limited branch of instances in which the personal interest of the injured party is really alone the matter in question, such as assaults, not of an aggravated character, or possibly slanders or libels. I will not consider the limitation which ought to be placed upon contracts or agreements made in that limited branch of cases. But I will deal generally with the wrongs committed against the public as well as against the individual. It is not possible to deny that embezzlement, like false pretences, is a crime committed against the public as well as against the individual, and in deciding what steps should be taken to punish it, the person who has to deal with the case must, if he is to do his duty conscientiously, consider the public as well as himself. But still the subject of reparation does seem to me to be one which may fairly be taken into the consideration of the case. First of all, reparation is a duty which the offender owes quite independently of his fear of prosecution or otherwise; and it would be absurd, to my mind, to lay down as an impossible means of protection that the relatives of the offender and his friends are not justified, nay even are not bound, in certain instances to assist him in making reparation to those whom he has injured. It is impossible, therefore, to say that reparation is a matter which ought not to be made, as it is also impossible to say it is a matter which is not likely to affect the conscientious mind, and, to a certain extent, reasonably to affect the mind of a person who has been wronged. There is no use in laying down impossible means of protection. I agree with what Mr. Reid said that the law was not anxious to discourage reparation. But you must come back after reparation made to the one dominant test in each case. It is a circumstance which may lawfully be taken into consideration that the offender has done his best, or with the assistance of his friends or otherwise has done his best, to make good his wrong. But the mere fact of reparation is not, as I have said before, the test. The test is, what is the duty of a person who has been injured to himself and others? He must make no bargain about that. If reparation takes the form of a bargain, then, to my

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mind, the bargain is one which the court will not enforce. Now, in the case of *Jones v. The Merionethshire Permanent Benefit Building Society* and *The Merionethshire Permanent Benefit Building Society v. Jones*, Williams, J. has seen all the parties. He has considered the case very carefully, and we have considered it very carefully. My learned brethren have consulted Williams, J., and have found that he formed and entertained the opinion which we thought he entertained upon reading his judgment, namely, that the version of the story told by the plaintiffs in the Court of Equity was substantially the true one, that threats were made in substance of a prosecution, and that the fear of that prosecution was known to be the dominant influence that was affecting those who gave the securities. It is impossible under those circumstances, to my mind, not to come, if one is to trust Williams, J., who has seen the whole of the parties, to the view that his judgment cannot be disturbed. There was either an implied agreement not to prosecute, which is the view that Williams, J. has taken, or, at all events, these promissory notes were given on the terms that they should be kept and used if the prosecution did not take place. The prosecution did not take place, and it is sought to enforce these notes. The consideration of the notes was the corrupt bargain to stifle the prosecution. I use the term "corrupt" in the sense that it is a bargain which public policy forbids the court to give effect to. It is not a question of recovering back money paid. There might be a difficulty in recovering back money paid on account of the well-known ground which is shortly expressed in the maxim *Melior est conditio defendentis*. These promissory notes were given and sought to be enforced by this agreement. The plaintiffs cannot enforce them because the notes were given in pursuance of the private bargain which the law will not permit. Then there is another head under which this class of case might be suggested to fall, and that is pressure or undue influence. I am not myself satisfied that, if the learned judge was right, as we must take him to be in his view that there was an agreement not to prosecute, it would not properly follow as an inference of fact that there was undue influence and pressure, and undue influence and pressure exercised by the directors upon the delinquent and upon his friends who were the defendants in the common law action. It is not necessary for me to express an opinion, because the case is covered by the decision upon the first point. I abstain from expressing a final opinion upon that, but it must not be taken that I myself am convinced that there was no pressure, assuming the learned judge's view of the facts is the correct one. Pressure, it is obvious, would in equity entitle the person who was aggrieved to relief. I merely add one word as expressing my private opinion about a bribe given not to prosecute. It is obvious from what I have said that, if there is a duty which ought to be exercised by the aggrieved person upon moral ground, to pay another person money with the sole

object of influencing his judgment—which he ought to form independent of money consideration—it would be to do that which the law would not favour, and to receive it with that sole object would, it seems to me, be to receive it without any good consideration. It is perhaps academical to discuss this matter further, because in most cases where a bribe has been given it was under such circumstances as that both the recipient and the giver understood that it was a bribe. The proper inference of the fact in all probability would be that there was a bargain. As regards the costs I agree with what my learned brother has said.

Fry, L.J.—There appear to me to be two questions for discussion in this case. The one is, whether there was any agreement not to prosecute; and the other is, whether there was any pressure. Now first, was there an agreement here not to prosecute? I confess that, during the course of the argument, my mind wavered a good deal as to whether there was any evidence of such an agreement. The case seemed to me to turn very much indeed upon whether or not the statement of Thomas Elias Jones, which he made in his answer to interrogatories, was true. That statement was somewhat curiously put into the case by the building society before the learned judge, and was repeated by the witness in his evidence in the box, but it was denied by the directors who were called. If it was true it is evident that the two alternatives were placed before the minds of all the persons who were discussing the arrangement in that room. According to the witness's account somebody referred to the prosecution of the secretary of a neighbouring building society, and he spoke of the directors in that case jumping at the security rather than punishing their secretary. There were two alternatives—taking the money or pursuing the prosecution—plainly before them. He then added that, if they sent Cadwaladr to prison, they would get nothing. That applies to the two alternatives in this particular case. There was a great deal of discussion before us as to whether the learned judge did, or did not, believe that statement. I have thought it right to ascertain from himself whether he did, or not, believe that statement. He says that he considered the statement of Thomas Elias Jones to be substantially true. That being so, it appears to me that there was evidence before the learned judge, accepted by him as true, upon which it is not for me to throw any doubt. From that evidence the learned judge had reasonably concluded that there was a bargain between the parties to pursue in this case the course which had been pursued by the neighbouring building society—*i.e.*, to take the money upon the terms of not prosecuting? I think, therefore, that it is impossible to differ from the opinion of the learned judge upon that part of the case. Then was there that pressure which enabled the Joneses to come forward in their character of oppressed parties to sue the building society as oppressors in the Court of Equity? The

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learned judge has not found that there was any such pressure, and for my own part I cannot find any reason to quarrel with his conclusion. The result of that would be, of course, the dismissal of the proceedings in equity. But, as already observed by Lindley, L.J., there has been an agreement embodied in the order to which he has referred, by which the counsel for the building society appear to feel themselves bound to this extent that they would not raise any question about the custody of the notes. Attention being drawn to it they declined to argue it. That being so, it appears to me that the order indicated by Lindley, L.J. is the right one to make. I agree also as to the costs.

Appeal dismissed.

Solicitors for the appellants, *Robins, Billing, and Co.*, agents for *George Henry Ellis, Blaenau Festiniog.*

Solicitors for the respondents, *Indermaur and Brown*, agents for *J. T. Roberts and Roberts, Carnarvon.*

COURT OF APPEAL.

December 1 and 5, 1891.

(Before LINDLEY, BOWEN, and FRY, L.JJ.)

McCLATCHIE v. HASLAM. (a)

APPEAL FROM THE CHANCERY DIVISION.

*Stifling a prosecution—Agreement—Validity—Execution of deed
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An action was brought by a married woman to set aside a mortgage of her property to the defendants, who were the trustees of a land society, to secure moneys which had been misappropriated by her husband, who was the secretary of the society, on the ground that the security was given under threats of a criminal prosecution against her husband.

Held, that the burden was on the plaintiff to prove pressure or undue influence, neither of which had been substantiated; and that consequently her action could not be maintained.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

Williams v. Bayley (14 L. T. Rep. N. S. 802 ; L. Rep. 1 E. & I. App. 200) explained.
Decision of Kekewich, J. (63 L. T. Rep. N. S. 376) reversed.

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THE plaintiff's husband was the secretary and the defendants were the trustees of the Long Heaton Freehold Land Society.

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The plaintiff's husband had misappropriated some of the funds of the society, and the plaintiff had executed a mortgage of her own property to the defendants to secure the amount which should be found due from the husband.

The plaintiff brought this action to set aside the mortgage, alleging that she had executed it solely in consequence of the threats of the defendant to institute criminal proceedings against her husband if she declined to execute the same, and in order to stifle and prevent such prosecution.

The defendants by their statement of defence denied that any threats had ever been made by them, or that the plaintiff had executed the mortgage otherwise than freely and voluntarily. They alleged that the plaintiff's husband being unable to pay over certain money which he had received as secretary of the land society, had offered the security in question which they had agreed to accept.

The mortgage to which the husband was a party was dated the 16th day of May, 1888. It recited that the husband was indebted to the defendants in 250*l.*, and that the husband and wife had agreed to secure it. The husband and wife covenanted for repayment, and the wife assigned an annuity, a life policy, and certain other property of hers as security. The mortgage provided that the property should be a security for further sums which might be found due up to the amount of 800*l.*

The action came on for trial before Kekewich, J. on the 8th day of June, 1890.

The plaintiff, who was the only witness on her behalf, deposed that her husband had told her that he wanted her to go to the office of Mr. Elborne, a solicitor; that the defendant Haslam, one of the trustees of the society, was there; that Haslam said that they wished her to sign a deed to save her husband from prosecution; that this was the first time she had heard of it; that Haslam said that it was a pity she had to do it; that she went to the commissioner, who asked her if she did it voluntarily; that she said "Yes;" and that she had no communication with her husband.

The defendant Haslam deposed that in May, 1888, the sum in default was named as 250*l.*; that he never used the word "embezzlement" or "prosecution;" that McClatchie told him that he had not the money, but that his wife was willing to secure it, and that he had arranged with her; that he, Haslam, told the plaintiff nothing at Elborne's office; that he did not, in fact, know anything about the accounts; that McClatchie himself told

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the plaintiff that he was wrong with the society; and that the trustees never had any idea of instituting a prosecution against McClatchie.

Morley, the other defendant, deposed that he had never seen the plaintiff, and that there never was any suggestion of a prosecution.

Elborne was the solicitor who prepared the mortgage, and he deposed that he was not the solicitor of the society, and did not know the circumstances which led to the security being given; that he had been instructed to prepare the mortgage for 250*l.*, and any other sums which might appear due; that he fully explained the deed to the plaintiff; that on the execution of the deed which had been prepared to cover further sums up to 400*l.*, the defendant Haslam said that that would not cover the liability, and that the sum was accordingly altered to 800*l.*

It was decided by Kekewich, J. (63 L. T. Rep. N. S. 376) that, although there might have been no threat used towards the plaintiff, yet it must have been present to her mind that, unless something was done to prevent it, her husband would be, at any rate, liable to a criminal prosecution; that this information came either from the defendant Haslam, or from the plaintiff's husband as agent of the trustees; that this must have been the motive of the plaintiff in executing the deed; and that it must, therefore, be delivered up to be cancelled.

From that decision the defendants now appealed.

Ozens-Hardy, Q.C., and *Dundas Gardiner* for the appellants. —The respondent's evidence does not establish any case of threat or duress. It would not be enough even to show that the appellants abstained from prosecuting by reason of the security: (*Flower v. Sadler*, 10 Q. B. Div. 572.) It was quite open to the appellants to treat the debt as a civil liability. They referred also to *Williams v. Bayley* (14 L. T. Rep. N. S. 802; L. Rep. 1 E. & I. App. 200.) They were stopped by the Court.

Haldayne, Q.C. and *J. G. Wood* for the respondent. The court cannot come to any other conclusion than that the respondent executed this deed in order to prevent her husband from being prosecuted for fraud. Under such circumstances she was not a free agent, and the case comes within *Williams v. Bayley* (*ubi sup.*)

No reply was called for.

Our. adv. vult.

Dec. 5, 1891.—The following judgments were delivered:—

LINDLEY, L.J.—This is an action in the Chancery Division to set aside a security upon the ground that it was given under pressure; that is to say, threats of legal proceedings—criminal proceedings. The action is brought by a married woman. Her husband was the treasurer of the Long Heaton Freehold Land Society. His accounts were wrong. There was the sum of 250*l.* due from him. He told the solicitor, Mr. Elborne, that his wife would give security. He told Mr. Haslam, one of the

trustees, that his wife would give security for the total amount of his indebtedness. His wife, under the circumstances to which I will allude presently, executed, by way of security for her husband's debt, a charge upon some reversionary interest of hers in some money. That is the security which she now seeks to set aside. The undisputed facts of the case are, that certainly here there is no trace of any agreement not to prosecute, and the plaintiff has based her case in her pleadings—which were drawn by a very competent gentleman who knows what he is about—solely on pressure and undue influence. Now the security which she gave, and which she seeks to impeach, was very carefully explained to her by the legal gentleman who prepared it, a gentleman who appeared as a witness before Kekewich, J., and with whose conduct Kekewich, J. expressed himself thoroughly satisfied. There was not a word to be said against him. He was not acting as a partisan in any way, and he did his duty as a solicitor of character ought to have done. Further than that, by reason of the nature of the interest which she was charging, she appeared before the commissioner, who took her assent to this document, and examined her and explained it to her apart from her husband. Those are undisputed facts. Under those circumstances, what is it necessary for the plaintiff to prove in order to obtain relief? She must prove her allegation that she was induced to give this security by undue influence and pressure. I thought at one time it was possible that she might try to shift the burden of proof by reason of the transaction being one in which a wife was making a sacrifice for her husband. But I do not think that that view is sound where a married lady has been separately examined, and has had the protection intended to guard against any such undue influence, and comes to impeach a document which she has executed under that protection. It appears to me that the burden is on her to make out her defence. Now, has she made it out? That depends upon the view that must be taken, of course, of the oral evidence. Kekewich, J. has decided the case in her favour; but he has not found as a fact that she executed this deed under pressure. We have, all of us, scanned his judgment with the utmost care, and we cannot come to the conclusion that he has decided in her favour upon that ground. He appears to us to have decided the case in her favour upon an erroneous view of the law as laid down in *Williams v. Bayley* (14 L. T. Rep. N. S. 802; L. Rep. 1 E. & I. App. 200). He says this: "I have not the slightest doubt on the evidence and facts before me that it was present to their minds"—that is the directors—"that he was in this great strait, and that unless something was done he would be at any rate liable to criminal prosecution." That is what he finds. We do not see any reason to differ from that finding. The learned judge goes on thus: "I have no doubt that that was the motive of Mrs. McClatchie, and that she did intend to get her husband out of that difficulty even at the

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sacrifice of her own property, and that the law does not allow.” Now, the law does not go that length. I have explained, we have all explained in dealing with the case of *Jones v. The Merionethshire Permanent Benefit Building Society* (ante, p. 389) that in order to invalidate a transaction of this kind you must prove one of two things; either an agreement not to prosecute, which we can dismiss from our minds here; or pressure and undue influence. It is not the law that, if a lady makes a sacrifice to get her husband out of a scrape, she can necessarily impeach the security which she gives, even although the result is to “stifle a prosecution.” Now I come to the question of fact, and this depends upon a careful examination of the evidence. She tells one story, and Mr. Haslam tells a diametrically opposite story. Pressure by her husband is distinctly negatived by her. She will not allow that that had anything to do with it. Pressure did not come from that quarter at all events. If it came from any quarter, it was in a conversation which she alleges took place with Haslam just before they went to Elborne’s office. Now, it appears to me that the burden of proof being upon her she has not satisfied it. I do not know the real truth about the undue pressure, but my own belief upon the evidence is that it was rather the other way—in other words, that she was not subjected to undue pressure. Under those circumstances I think that this appeal ought to be allowed and the action dismissed with costs. There will therefore be judgment for the defendants with costs here and below.

BOWEN, L.J.—I have had the greatest difficulty in this case in making up my mind as to what was the true view to be applied. The learned judge, as it appears to me, has decided the case, so far as I can feel at all confident, upon the view of the law which my learned brother has indicated. Kekewich, J. has pointed out that the true nature of the transaction is one that cannot stand in equity, if a wife gives security to get her husband out of a difficulty when she knows the difficulty may result in the criminal prosecution of himself. In such a case that security never could be enforced against the wife. To my mind that is rather too strong a proposition to lay down as a rigid rule of law. I think that you must look at the pressure in each case as a question of fact. Although I do not doubt but that where the transaction is one which, when it is open to suspicion ought to be examined with extreme care, still, one must come back to the particular circumstances of each case and see that the wife was a willing agent, knowing what she was doing and deliberately doing, and not influenced by threats made to her either directly by the society or by her husband. Now, the learned judge having taken that view did not apparently find it necessary as the *ratio decidendi* to his own mind to find specific facts. Without such finding one becomes rather embarrassed if one departs from the view of the law with which the learned judge began. That is

where the difficulty in this case oppresses us. The two stories, the story told by the wife and the story told by Haslam the trustee, are diametrically opposite. The story told by the wife is, in substance, as follows: that she having been told nothing by her husband, was taken down to the solicitor's office, where she met Haslam, and where she was told by Haslam that her husband would be prosecuted if she did not give the security. If that story were true there was unquestionably pressure. But the learned judge has not found that he believed that story. On the contrary, he disbelieves it in one very material element. He says he does not think that the plaintiff has told the truth when she says she never heard of it from her husband before going down to the solicitor's office. That displaces a great part of the evidence upon which one would rest one's view of pressure. Supposing the wife had been taken down to the solicitor's office by her husband, and had been told nothing about it, and on the way had met Haslam, and had been informed by him that her husband would be prosecuted unless she gave the security, to my mind those circumstances, as I have stated, would prove pressure. I think that, even if she had been taken down to that office without knowing beforehand what she was going to do, and she had met Haslam outside, and had had a conversation with him as the result of which she went in and executed the deed, the suddenness and the surprise of the transaction upon her would be a strong indication, to my mind, that this case fell within the category of cases where undue influence has been exercised, and where the Court of Equity will not allow the transaction to stand. Even if she had been brought as a reluctant victim to the office of the solicitor by her husband, and had been met outside by the solicitor, and had had a conversation which furthered the views of her husband, then I should think it was a very great question whether pressure had not been exercised; but the difficulty was in seeing that she was a reluctant victim at all. If you disbelieve her evidence upon the point as to what passed between her husband and herself, whom can we trust in the case at all to establish that proposition on her behalf, that she was a reluctant victim, or that she had not full notice of what she was going to do, or that her account of the conversation with Haslam outside the solicitor's office, which is entirely denied by him, is to be taken as substantially correct? Kekowich, J. does not find that he believes her story. It is true only to a certain extent. He impeaches the story told by Haslam, but he does not tell us how far he goes in impeaching it, and that being the way in which the case is left, one can only say that, in this instance, the burden being on the plaintiff to establish her case, she, to our mind, has failed to sustain the burden. Although I agree that the case is far from an easy one, she fails because she has not discharged herself of the necessity of proving her case.

Fry, L.J.—I have, like my learned brethren, scanned the

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judgment of the learned judge in the court below with all the attention I can give to it, our endeavour being to find out what the issue of fact is upon which he has come to a conclusion. I need not say that, where he saw the witnesses and heard the evidence and had come to the conclusion on the issue of fact, I should find the greatest difficulty in any way in differing from him. But I can only ascertain in this case that he has found two things. He has found that it was present to the minds of the directors that the husband was in a great strait, and that unless something was done he would at any rate be liable to a criminal prosecution. He does not find before that there was any intention to prosecute. Further, he comes back again that that was the motive. I suppose that means that the desire to avoid prosecution was the motive of Haslam, and that the plaintiff did intend to get her husband out of the difficulty by the sacrifice of her own property. That is the second point that he finds. Then he says the law will not really apply. Now, I do not accept that as the law of England. I think it is quite possible that the directors may know that the man is liable to prosecution; the wife may know the same; and if she, of her own will, makes a sacrifice for the purpose of protecting her husband, that is not pressure, and that is not a bargain. Then there is another passage, which I have also scanned very carefully like the rest of my brethren, in which the learned judge says that he believes, from the way in which the case was brought before the plaintiff, she was asked, and almost demanded, to execute the deed. Now, if that passage had referred to a demand made by Haslam, I should have concluded that the learned judge had found actual pressure and threats. But, unfortunately, the learned judge does not find it in that way, because he has come to the conclusion that the husband made the threats, and he has said that the husband was agent of the society to make those threats. I think there is no evidence of such agency. It must be borne in mind that the threats were threats which the wife entirely denies without any suggestion from her husband. Therefore I cannot attribute that finding to the action of Haslam. Now, even if the learned judge had told us that he believed the wife's story and disbelieved Haslam's story throughout, we should have had some firm ground to go upon. But he has not done so. He has said that he believes one particular statement of Haslam's is somewhat in excess of the actual facts, but he has found even more fault with the evidence of the wife. He has totally discredited it, and thrown it over on the most important part of the narrative. I find myself then reduced to the two findings of fact to which I have referred. They are not sufficient to maintain this judgment. Now, if departing from the judgment of the learned judge I apply my mind to the evidence as it stands upon the paper, all that I can say is, that I am in no way convinced that the plaintiff's case is right independently of the finding of the judge who saw and heard the witnesses. I cannot say that I am convinced of the plaintiff's case. It conse-

quently fails, and the action ought to have been dismissed from the beginning. McCLATOHIE
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Appeal allowed.

Solicitors for the appellants, *Swann and Co.*, agents for *E. Newcome Elborne*, Nottingham.

Solicitors for the respondent, *Torr and Co.*, agents for *Parker Woodward*, Nottingham.

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QUEEN'S BENCH DIVISION.

Wednesday, Nov. 4, 1891.

(Before MATHEW and SMITH, JJ.)

REG. v. BROCKLEHURST AND OTHERS. (a)

Vaccination—Order for—Non-compliance—Summary proceedings—Authority of vaccination officer—Further proceedings—Regulations of the Local Government Board 1874, art. 16—Vaccination Act, 1867 (30 & 31 Vict. c. 84), s. 31.

B., a vaccination officer, acting under the directions of and on behalf of the Reigate Board of Guardians, obtained an order requiring K. to have his child vaccinated. K. failed to comply with this order, whereupon B. summoned him before the justices under sect. 31 of 30 & 31 Vict. c. 84, requiring him to show some reasonable grounds for his omission to carry the said order into effect. The justices refused to make any order on the ground that it was necessary for B., under sect. 31 of the Vaccination Act, 1867 and art. 16 of the Local Government Board Regulations, 1874, before taking out the summons on K.'s non-compliance with the order made on him, to have reported the matter to the board of guardians and to have obtained their further instructions, and that there was no evidence before them that he had done so.

Held, that the words "further proceedings" in art. 16 of the Local Government Board Regulations, 1874, do not apply to proceedings taken under sect. 31 of the Vaccination Act, 1867, for the imposition of a penalty on non-compliance with a vaccination order, except where a penalty has already been imposed and it is sought to impose a fresh penalty in respect thereof.

ON the 3rd day of February, 1891, William Bethell, the vaccination officer for the Horley District of the Reigate

(a) Reported by ALFRED H. LEFROY, Esq., Barrister-at-Law.

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Union, in the county of Surrey, laid an information, under sect. 31 of the Vaccination Act, 1867 (30 & 31 Vict. c. 84), against one Alfred King, for not complying with an order made on him requiring him to have his child vaccinated.

A summons was issued by the justice before whom such information was laid, requiring the said Alfred King to attend before the magistrates on the 14th day of February, 1891, who on that day made an order for the vaccination of his child within twenty-one days. King not complying with this order, a summons was issued against him requiring him to show some reasonable grounds for his omission to carry the said order into effect.

On the 9th day of May, 1891, the last-mentioned summons came on for hearing before the justices sitting at Reigate, namely, Edward Brocklehurst, Frederick Charles Pawle, and Percy Leonard Pelly, the defendants in this case. The said Alfred King did not appear.

The justices refused to make any order, on the ground that there was no evidence before them that art. 16 of the Local Government Board Regulations, 1874, had been complied with, and that, before taking out the summons on King's non-compliance with the order of the 14th day of February to have his child vaccinated, it was necessary for the vaccination officer, under sect. 31 of the Vaccination Act, 1867 (31 & 31 Vict. c. 84), and the said art. 16, to have reported the matter to the board of guardians and to have obtained further instructions.

The Guardians of the Reigate Union thereupon obtained a rule *nisi* calling upon the said justices to show cause why they should not hear and determine a certain summons requiring the said Alfred King to show some reasonable grounds for his omission to carry into effect certain orders made on the 14th day of February, 1891, requiring him to have his child vaccinated.

Sect. 31 of the Vaccination Act, 1867 (30 & 31 Vict. c. 84) enacts that:

If any registrar, or any officer appointed by the guardians to enforce the provisions of this Act, shall give information in writing to a justice of the peace, that he has reason to believe that any child under the age of fourteen years, being within the union or parish for which the informant acts, has not been successfully vaccinated, and that he has given notice to the parent or person having the custody of such child to procure its being vaccinated, and that this notice has been disregarded, the justice may summon such parent or person to appear with the child before him at a certain time and place, and upon the appearance, if the justice shall find, after such examination as he shall deem necessary, that the child has not been vaccinated, nor has already had the small pox, he may, if he see fit, make an order under his hand and seal directing such child to be vaccinated within a certain time; and if at the expiration of such time the child shall not have been so vaccinated, or shall not be shown to be then unfit to be vaccinated, or to be insusceptible of vaccination, the person on whom such order shall have been made shall be proceeded against summarily, and, unless he can show some reasonable ground for his omission to carry the order into effect, shall be liable to a penalty not exceeding twenty shillings.

Art. 16 of the Local Government Board Regulations, dated the 31st day of October, 1874, provides that:

The guardians are to give directions authorising the officer to institute and conduct

proceedings, but the officer is not to take further proceedings in any case in which an order has already been obtained and summary proceedings taken under this section until he shall have brought the circumstances of the case under the notice of the guardians, and received their special directions thereon.

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A circular letter of the Local Government Board, dated the 31st day of October, 1874, accompanied the said general order of that date, and contained the following paragraph :

The guardians may either give special directions in each individual case of default, or they may give such general directions as will enable the vaccination officer to take the proceedings in the first instance in every case of default without referring to them, but the board have thought it right to require as regards proceedings under sect. 31 that the vaccination officers shall not, in any case in which a magistrate's order was made and summary proceedings taken thereon, apply for another order until they have brought the case before the guardians and received special directions concerning it.

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Macmorran now appeared on behalf of the justices to show cause against the above rule.—The justices were right in their decision. They have heard the summons, but refused to make an order, so that there is no reason why they should receive a *mandamus* compelling them to hear and determine what they have already heard. The interpretation of article 16 by the justices was the right one. If an order is made under sect. 31 of the Act of 1867, directing a child to be vaccinated within a certain time, and that order is not complied with, it is directed by that section that the person so failing to comply shall be proceeded against summarily, and be liable to a penalty. It is submitted that this summary proceeding under sect. 31 is a "further proceeding" for which art. 16 of the Local Government Board Regulations requires that the vaccination officer should have special instructions from the board of guardians. *Bethell* had received no such special instructions, nor was there any evidence before the justices of his having received any authority to take this "further proceeding." Assuming, however, that the justices had no right to demand any evidence of such authority, the proper course to take would be to apply to them to state a case: (*Reg. v. Justices of Wisbech*, 54 J. P. 743.)

Lumley Smith, Q.C. (*Burleigh Muir* with him) appeared for the guardians in support of the rule.—Under sect. 31 of the Act of 1867 the course of procedure is pointed out. First the order is made directing vaccination. That is not a summary proceeding. Then, if that order is not complied with, it is directed that summary proceedings shall be taken for the recovery of the penalty. The vaccination officer does not require fresh authority to take this second step. This is what is referred to in art. 16, when it refers to summary proceedings having already been taken. The whole point, however, is, what does "further proceedings" in art. 16 mean? Now, the object of this article was to prevent a vaccination officer recovering more than one penalty for continued disobedience to the same order. In the case of *Allen v. Worthy* (21 L. T. Rep. N. S. 665; L. Rep.

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5 Q. B. 163) it was held that a parent having been fined under sect. 31 of the Act of 1867 for disobeying an order to have his child vaccinated, might be proceeded against from time to time as long as the child remained unvaccinated. And in *Knight v. Halliwell* (30 L. T. Rep. N. S. 359; L. Rep. 9 Q. B. 412, see remarks of Cockburn, C.J. at p. 415), this was considered a hardship, and to prevent it the Local Government Board framed art. 16. It is submitted, therefore, that the words "further proceedings" in that article refer to a case in which proceedings are taken to recover further penalties for the same offence, and it is for such proceedings that art. 16 requires the vaccination officer to receive the "special directions" of the board of guardians. The present was not such a case, and the justices were wrong, therefore, in refusing to convict, and the rule should be made absolute.

Macmorran was heard in reply.

MATHEW, J.—This rule must be made absolute. The cases cited by Mr. Lumley Smith make it quite clear that under sect. 31 of the Act of 1867 a parent, having already been fined under that section, might be proceeded against from time to time so long as the child remained unvaccinated. This was considered to be oppressive, and it was to remedy this state of things that the Local Government Board, by virtue of the power given to them by sect. 5 of the Vaccination Act, 1871 (34 & 35 Vict. c. 98) and sect. 1 of the Vaccination Act, 1874 (37 & 38 Vict. c. 75) framed art. 16 of the Regulations of 1874. The language of that article is not at first sight clear, but, upon examining the expressions used, and by referring to sect. 31 of the Act of 1867, I am of opinion that the words "summary proceedings" in that article refer to the proceedings for the recovery of the penalty imposed by sect. 31, and that the words "further proceedings," the taking of which necessitates obtaining the special directions of the board of guardians, refer only to cases where a man is proceeded against for a fresh penalty in respect of the same act of disobedience. No fine, however, under sect. 31 has been inflicted on the man King; therefore the justices were wrong in holding that, before they could convict King, they required evidence that the vaccination officer had received the special directions of the board of guardians under art. 16.

SMITH, J.—I am entirely of the same opinion. The whole case turns upon what is the meaning of the words "further proceedings" in art. 16. If an order for vaccination is made, and this order is not complied with, the person disobeying such order may be proceeded against summarily, and have a fine inflicted upon him. This proceeding, however, does not require any special directions from the board of guardians. But if the same man continues to disobey the same order, and the vaccination officer wishes to proceed against him *de novo*, this would be a "further proceeding" within the meaning of art. 16, and it would be necessary to get "special directions." The justices were there-

fore wrong in their construction of this article, and the rule must be made absolute.

Rule absolute.

Solicitors for the justices, *H. Tyrell and Son*, for *J. M. Head*,
Reigate.

Solicitors for the guardians, *Morrison*, for *F. C. Morrison*,
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COURT OF APPEAL.

Monday, Dec. 14, 1891.

(Before Lord ESHER, M.R., LOPES, and KAY, L.JJ.)

REG. v. FARMER AND ANOTHER (Justices of Salford). (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Bastardy—Service of summons—Last place of abode—Jurisdiction of justices—Certiorari—Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4.

Under sect. 4 of the Bastardy Laws Amendment Act, 1872, which provides that the justices may make a bastardy order, in the absence of the defendant, upon proof that the summons "was left at his last place of abode six days at least before the petty sessions," the summons must be left at his present place of abode, if he has a place of abode at the time of the service, and if he has none, then at his last place of abode. If at the time of the service the defendant has his place of abode out of the jurisdiction, the summons cannot be served at all.

A bastardy summons was left at the defendant's last place of abode in England, and at the hearing the justices found, in his absence, that the summons had been duly served upon him, and made an order against him. Upon an application for a certiorari it appeared, from fresh evidence, that the defendant was in America, and had a place of abode there, when the summons was served.

Held (making absolute a rule for a certiorari), that the court had power to review the decision of the justices upon the question of service; that the summons had not been duly served under

(a) Reported by J. HERBERT WILLIAMS, Esq., Barrister-at-Law.

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sect. 4, and that the order was therefore made without jurisdiction.

Reg. v. Evans (19 L. J. 151, M.O., followed).

THIS was the argument of a rule *nisi* granted by the Court of Appeal upon the application of one Riley, calling upon Sir James Farmer and Richard Husband, Esq., justices of Salford, to show cause why a writ of *certiorari* should not issue to remove into the Queen's Bench Division a certain order of the said justices, made on the 25th day of March, 1891, adjudging Riley to be the putative father of a certain bastard child of one Elizabeth Howarth, on the grounds that when the summons was issued and alleged to be served the applicant's place of abode was in America, and the order was made in his absence and without notice to him, and without his knowledge thereof, or of the summons, and that the order was made without jurisdiction, the summons not having been served personally nor left at Riley's last place of abode.

On the 26th day of February, 1891, one Elizabeth Howarth was delivered of a bastard child, of which she alleged that one Riley was the father, and obtained a summons against him, under sect. 3 of the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65). Riley had been living at his father's house in Salford, and had no other place of abode in England. The summons was obtained on the 13th day of March, and on that day was left at the house of Riley's father. On the 25th day of March the summons came on to be heard; Riley himself was not present; it was proved that the summons had been left at the house of Riley's father on the 13th day of March, and a witness swore that she had seen Riley in Salford on the 15th day of March, but Riley's father stated that he had gone to America in February. The complainant gave evidence, which was corroborated, that Riley was the father of the child, and the justices found that the summons had been actually served upon Riley, and made an order adjudging him to be the putative father of such bastard child, and ordered him to pay 5s. a week until the child was fourteen.

Upon the application for a *certiorari* it appeared from fresh evidence, then adduced upon affidavit, that Riley was actually in America on the 5th day of March, that he had gone there with the intention to stay and settle down, and had a place of abode at his brother's house in America. He swore that as soon as he heard of the order he determined to return to England to contest it; that he was prevented by illness from returning until September; that he was taken ill on arriving in England, and that owing to those causes his application for a *certiorari* was not made until more than six months after the date of the order of the justices.

The Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65) provides:

Sect. 3. Any single woman who may be with child or who may be delivered of a

bastard child after the passing of this Act may either before the birth or at any time within twelve months from the birth of such child, or at any time thereafter, upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance, or at any time within the twelve months next after the return to England of the man alleged to be the father of such child, upon proof that he ceased to reside in England within the twelve months next after the birth of such child, make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of the child, and if such application be made before the birth of the child the woman shall make a deposition upon oath stating who is the father of such child, and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child to appear at a petty session to be holden after the expiration of six days at least for the petty sessional division, city, borough, or other place in which such justice usually acts.

Sect. 4.—After the birth of such bastard child, on the appearance of the person so summoned, or on proof that the summons was duly served on such person, or left at his last place of abode, six days at least before the petty session, the justices in such petty session shall hear the evidence of such woman and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child; and they may also, if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment to the mother of the bastard child, or to any person who may be appointed to have the custody of such child, under the provisions of the said recited Act, of a sum of money weekly, not exceeding five shillings a week.

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The application of Riley for a rule *nisi* for a *certiorari* to bring up the order to be quashed was refused by the Queen's Bench Division (Lord Coleridge, C.J. and Wright, J.) but a rule *nisi* was subsequently granted by the Court of Appeal.

Cluer for the respondent.—There is a preliminary objection that the application for this rule was too late. By the Crown Office Rules, r. 33, a writ of *certiorari* must be applied for within six calendar months next after the order shall have been made.

Le Riche for the applicant.—Under the circumstances of this case the time for applying ought to be extended; rule 297 gives the court or a judge power to enlarge or abridge the time appointed by the rules.

The Court extended the time.

Cluer showed cause.—This rule ought to be discharged upon two grounds: first, because the justices decided as a question of fact upon conflicting evidence that this summons had been duly served, and that the decision cannot be reviewed; secondly, because this summons was left at the house of the father of the applicant, which was the applicant's "last place of abode" within the meaning of the Act. When justices have decided a question of fact which they had jurisdiction to decide, and there was evidence before them upon which they could decide, their decision is not open to review upon an application for a *certiorari*: (*Brittain v. Kinnaird*, 1 Brod. & Bing. 432; *Reg. v. Bolton*, 1 Q. B. 66; *Ex parte Baker*, 2 H. & N. 219.) There can be no distinction in principle between a case where both parties were present before the justices and a case where the proceedings were *ex parte*, if the question is one of fact which the justices

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have jurisdiction to decide. It was a question of fact whether this summons was served upon the defendant, and the justices decided that it was, upon evidence which justified that finding. The later cases seem to be against this contention, but they are inconsistent with the earlier cases I have cited, and ought to be overruled. Those cases are *Reg. v. Evans* (19 L. J. 157, M. C.); *Reg. v. Lee* (16 Cox C. C. 404; 58 L. T. Rep. N. S. 384; 52 J. P. 344). Assuming, however, that the decision of the justices can be questioned upon this application, it appears clearly from all the evidence now before the court that the summons was duly served under the Bastardy Laws Amendment Act, 1872, sect. 4, by being left "at the last place of abode" of the defendant, which was his father's house at Salford: (*Reg. v. Brown*, 1 L. T. Rep. N. S. 29; 22 L. J. 143, M. C.; *Reg. v. Damerell*, L. Rep. 3 Q. B. 50; *Reg. v. Higham*, 7 E. & B. 557; *Reg. v. De Winton*, 16 Cox C. C. 455; 59 L. T. Rep. N. S. 382.) The case of *Berkeley v. Thompson* (52 L. T. Rep. N. S. 1; L. Rep. 10 App. Cas. 45) is not against my contention, for that case only dealt with the question of personal service.

Le Riche, for the applicant, was not heard.

LORD ESHER, M.R.—In this case the justices made an order against the appellant adjudging him to be the putative father of a child born in England, upon the application of its mother. The man appeals upon the ground that the justices had no jurisdiction to make the order, and his appeal is not against any proceeding taken to enforce that order, but is an application for a *certiorari* to bring up that order to be quashed. If this were a case of proceedings taken to enforce the order of the justices, I think that the case of *Brittain v. Kinnaird* (*ubi sup.*) would be conclusive to show that, inasmuch as the justices had jurisdiction to inquire whether service of the summons had been properly made, this court could not inquire into the question whether the decision of the justices was right or wrong. This, however is an application for a *certiorari*, to bring up the order to be quashed and therefore the case of *Reg. v. Evans* (*ubi sup.*) is a clear authority that the court could not only inquire whether there was any evidence before the justices to justify their order, but can also consider whether it agrees with the justices in the finding upon the facts. The decision in *Reg. v. Evans* (*ubi sup.*) seems to be clear that, upon an application for a *certiorari*, the court can say whether it agrees with the finding of the justices, and the case of *Reg. v. Lee* (*ubi sup.*) decided by Hawkins and Charles, JJ. is to the same effect. I think that we cannot overrule the case of *Reg. v. Evans* (*ubi sup.*) but must follow it, and uphold the distinction drawn by that case that upon proceedings to enforce an order of justices the court cannot inquire whether the order was right or wrong, but that if an application is made to bring up an order to be quashed the Court is bound to consider the evidence which was before the justices, and to say then whether the order was right or not. Further than that, if we

have jurisdiction to make that inquiry, we are not confined to the evidence which was before the justices, but can hear further evidence. In this case we are called upon to say whether the decision of the justices upon a preliminary point was right or wrong. It is not material for us to consider whether, if the evidence had been the same before us as it was before the justices, we would have agreed with their decision or not, for we have now further evidence before us. The justices decided, upon the evidence before them, that service of the summons had been made at the house in which the appellant then abode at the time of the service, and was abiding for at least two days after, and they naturally inferred that the summons came to his knowledge. Can we now agree with that decision? I disregard the affidavit of the woman who swore at the hearing that she had seen the appellant about after the day on which the summons was served and now swears that she was mistaken. At the hearing her evidence was contradicted by the appellant's father who swore that his son had gone to America some time before the summons was served. If the evidence was now the same, I would agree with the decision of the justices. Now, however, the appellant himself swears that he was in America when the summons was served, and he is corroborated in that by a letter which is produced written from the appellant in America, and dated there on the 5th March, and bearing a post-mark in America of that date. The service of the summons was on the 13th March, and if the appellant's story is true we see at once that the finding of the justices was incorrect, for the man was not, on the 13th March abiding at his father's house where the summons was served. We must therefore now consider whether the service of the summons at his father's house in England, which was his last place of abode in England, was a good service. We must consider whether he had a place of abode in America. If he went to America for the purpose only of seeing his brother, with the intention of presently returning to his father's house in England, then he had no place of abode in America; if he went away simply with the intent to avoid service of this summons, meaning to return as soon as the thing had blown over and it was safe to return, then he had no place of abode in America. In such cases it would be correct to say that his last place of abode was his father's house in England. There is therefore a question of fact to be determined in this preliminary inquiry as to the service of the summons, and we must undertake that inquiry and determine that question. Upon the materials before us can we safely say that he went abroad simply to avoid service of the summons, or only temporarily? Ought we to infer a dishonest act on his part, when the evidence is equally consistent with honesty? I do not think that there is any sufficient evidence that he went to America to avoid service, or that we can say that he did not go to America in order to live and earn his livelihood there. I come to the conclusion, therefore, that he had a

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place of abode in America. Then comes the question, what is the true construction of sect. 4 of the Bastardy Laws Amendment Act, 1871 (35 & 36 Vict. c. 65), which enacts that "after the birth of such bastard child on the appearance of the person so summoned, or on proof that the summons was duly served on such person, or left at his last place of abode, the justices shall hear the evidence, . . . and may adjudge the man to be the putative father of such bastard child." Can we say that "left at his last place of abode," means his last place of abode in England, though he has acquired a place of abode abroad? Suppose a case where a man had a place of abode in England, that he left that place of abode and went to live in another part of England, but the people who wished to summon him could not find him although he was living in England. Which place, in that case, would be his "last place of abode"? I think that the place he was last living at would be his last place of abode. In my opinion the words "last place of abode" mean the place he is actually abiding in, or, if he has no abode at the time when service is to be made, but is wandering about or moving about so as to have no place of abode, the last place at which he was abiding. Does it, then, make any difference if a man has left his place of abode in England and has gone abroad and fixed his place of abode abroad? I think that we cannot read the words of the statute as making any such difference. We must, therefore, inquire whether the appellant's last place of abode was in England or in America. The answer to that inquiry determines this case, and I have already said that he had his last place of abode in America. The service, therefore, of the summons in England at his father's house was not a good service, and the justices had no jurisdiction to hear the summons. There is a further point raised, which is the one mentioned by Lord Selbourne, L.C. in *Berkley v. Thompson* (*ubi sup.*), that, even if the man were only wandering about in America and had no place of abode there, yet he would be abroad and out of the jurisdiction, and that there could in such case, be no service at his last place of abode in England, because there could not be any personal service abroad. There is, I think, much to be said in favour of that view, but it is not necessary to determine that question here, because the man had his last place of abode abroad. We must decide that there was no due service of the summons in this case under the statute, and that the justices had, therefore, no jurisdiction to inquire into it, and their order must be brought up to be quashed. We differ from the decision of the Lord Chief Justice in the court below in his application of the principles laid down in *Brittain v. Kinnaird* (*ubi sup.*) and *Reg. v. Bolton* (*ubi sup.*) to the present case, because he missed the distinction between proceedings to enforce an order of justices and an application for a *certiorari* to bring up an order of justices to be quashed. This rule must be made absolute.

LOPES, L.J.—This is an application for a *certiorari* to bring up an order of justices to be quashed, upon the ground that they

had no jurisdiction to make the order because there had been no proper service of the summons upon the appellant. Now, it is to be observed that this is not an application for a *certiorari* to bring up a decision, after a hearing upon the merits, to be quashed, for, if it were, the case of *Brittain v. Kinnaird* (*ubi sup.*) and *Reg. v. Bolton* (*ubi sup.*) would apply to and govern it; and this is the mistake which was made by the Lord Chief Justice, who missed the distinction between those cases and *Reg. v. Evans* (*ubi sup.*). As to the former cases there is another observation to be made, that both parties were present at the hearing, whereas in this case only the complainant was present. It appears to me that the present case is on all fours with the cases of *Reg. v. Evans* (*ubi sup.*) and *Reg. v. Lee* (*ubi sup.*), which show clearly that the court may inquire into the evidence upon a preliminary point as to the service of the summons, and consider both that evidence and other evidence upon the point. Here the justices decided that the defendant, the present appellant, was the putative father of the complainant's child; but there was a question as to the due service of the summons as the defendant did not appear. It was said that the summons had been actually served upon the defendant, and the evidence before the justices was sufficient to satisfy them of that, and on that evidence we could not disagree with them. Now, however, there is further evidence before us which shows that the defendant was not in this country when the summons was served, and upon the evidence, I believe that to be the fact. That being so, it is clear that the justices were wrong in their decision as to the service of the summons, this evidence not being before them. It is then said that this service was good, because by sect. 4 of the Bastardy Laws Amendment Act, 1872, the justices may make an order "upon proof that the summons was duly served on such person, or left at his last place of abode," and this summons was left at his last place of abode, namely, his father's house. Now, I do not think that this house was his last place of abode under the circumstances of this case, but I believe his last place of abode was his brother's house in America. Therefore, in my opinion, the service at his father's house was not sufficient. The case would be different if he had gone away in order to avoid service of the summons simply, as was said in *Reg. v. Evans* (*ubi sup.*) and other cases; but there is no evidence of that being the case here, or that he intended to return to his father's house. The words of the statute, "upon proof that the summons was left at his last place of abode," are not satisfied, and this order was made without jurisdiction.

KAY, L.J.—This case is not before us upon the merits of the case between the complainant and the defendant, but upon an application for a *certiorari* to bring up the order of the justices as having been made without jurisdiction. Two questions of very great importance arise, and I therefore desire to add my own views upon those questions. The one question is, whether

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this court has any power to entertain an application for a *certiorari* in a case like this; and the other whether, if the court has such power, the decision of the justices was right or not. The justices decided, in the absence of the present appellant, that he had been duly served with a bastardy summons, which had been left at his father's house, which was his last place of abode in England. The justices thought, indeed, that he still resided there when the summons was served, upon evidence that was adduced at the hearing of the summons. At this hearing the appellant was neither present nor represented; but his father, who did not and could not represent him, gave some evidence that he had left England before service of the summons. The first question is, whether this court can enter upon an inquiry whether the justices were right or wrong in holding that the summons had been duly served. It would be, in my opinion, a very serious matter to hold that an order can be made upon a man behind his back upon an irregular service of a summons, and that he has no power whatever to question it afterwards if it was wrong. Suppose a case in which, upon an absolutely false affidavit of the service of a summons, a magistrate made an order against a man where he was not present. Can it be possible that the defendant would have no power at all to set the matter right and question the decision of the magistrate upon clear proof that the affidavit was false? I do not think so; and there are distinct authorities to the contrary. The cases of *Brittain v. Kinnaird* and *Reg. v. Bolton* (*ubi sup.*) are clearly different cases, for in those cases both parties were present, and each had an opportunity of showing that the evidence of the other was wrong. In this case the defendant was not present, and was not represented, and had no opportunity of showing what the real facts were. The proceedings were entirely *ex parte*. If, therefore, the service of the summons was insufficient, I think that it is necessary, as a matter of natural justice, that the defendant should have the right to appeal here, and to show that the justices had no jurisdiction to make the order because there had been no service of the summons upon him. This very point has been expressly decided in *Reg. v. Evans* (*ubi sup.*), which was followed in *Reg. v. Lee* (*ubi sup.*), and which shows that the defendant has a right to apply for a *certiorari* to bring up the order to be quashed upon the ground that there had been no service of the summons. The next question, then, is, whether there was a proper service of the summons or not. Upon the facts now before us it is perfectly clear that there was no service of the summons upon the defendant himself, for he had left England and gone to America sometime before the summons was left at his father's house. Under these circumstances, was the service of the summons at his father's house a good service under sect. 4 of the Act? In my opinion, only one meaning can be given to the words of sect. 4 of the Act, "on proof that the summons was left at his last place of abode," and I think that "his last place of

abode" means the last place of abode which he had at the time when the summons was served; that is, his actual abode, or, if he had no actual abode, the last place at which he had been abiding. The section does mean his last place of abode in England; but he has not his last place of abode in England if he has a place of abode abroad, and therefore if the appellant had a place of abode in America, as I think he had, he had not a last place of abode in England within the meaning of the section. The truth is that when a man has left England and is abiding abroad—that is, has a place of abode abroad—before the service of the summons, he is not amenable to this Act at all. The Act in sect. 3, has a provision to meet such a case, and separately contemplates and deals with the case where a man is out of England and sect. 4 is inapplicable. Lord Selborne expresses that opinion in *Berkley v. Thompson (ubi sup.)*, where he says, referring to sect. 3 of the Act: "It is impossible to read that provision without seeing that this legislation proceeds upon the footing that the presence of the putative father in England is necessary for the jurisdiction to attach." I think that he there gives the real meaning of the statute, and that service of the summons cannot be made at all where the man is actually residing abroad at the time when the summons purports to be served. This rule must be made absolute to bring up this order to be quashed.

Rule absolute for a certiorari.

Solicitors for the appellant, *Le Riche and Stephens.*

Solicitors for the respondent, *Jaques and Co.*

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QUEEN'S BENCH DIVISION.

Wednesday, Dec. 2, 1891.

(Before Lord COLERIDGE, C.J. and WRIGHT, J.)

DYKE v. GOWER. (a)

Adulteration of food—Alteration of article—Milk—Abstraction of fat—Sale of milk from which fatty matter has been abstracted—Absence of guilty knowledge—Conviction of the seller—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 9.

Milk purchased at the shop of the defendant proved on analysis to be deficient in cream to the extent of 33 per cent. The milk

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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having been received pure and good from the country had been placed in a large vessel, from which it was served out in small quantities as occasion required. The respondent urged that it was the natural tendency of the fatty matter to rise to the top, and that the quality of the milk therefore necessarily diminished as time went on and the upper portion containing more than its due proportion of cream was removed. The magistrate having accepted this excuse and having refused to convict under sect. 9 of the Sale of Food and Drugs Act, 1875:

Held (allowing the appeal), that an offence had been committed within that section, the object of the Act being to protect the buyer; And that therefore upon proof of the sale of an article of food from which an element has been abstracted, the intention of the abstractor is immaterial and his ignorance of the abstraction affords no excuse.

Pain v. Boughtwood (16 Cox C. O. 747; 62 L. T. Rep. N. S. 284; 24 Q. B. Div. 353) approved.

THIS was an appeal by way of special case from the decision of Mr. De Rützen, one of the metropolitan police magistrates, and it raised the question of the construction of sect. 9 of the Food and Drugs Act, 1875. The appellant Dyke was an inspector for the vestry of St. George's, Hanover-square, and the respondent Gower was a milk seller. The inspector purchased in the shop of the respondent some milk which on analysis he found to be deficient in fatty matters to the extent of 33 per cent. It was proved that the practice of the respondent was to receive the milk in large quantities from the country, and that it reached him pure and good. In the shop it stood in large pails containing about sixteen gallons, from which it was served out in quarts to customers as occasion required. It was proved that under such circumstances there was a natural tendency for the cream to collect at the top, and that therefore, if the milk were not continually stirred, the quality would naturally fall off as the bottom was approached. The respondent having been charged under sect. 9 of the Food and Drugs Act, 1875, with selling without disclosure of the alteration an article of food from which a portion had been abstracted so as to injuriously affect its quality, the magistrate considered that the abstraction was accounted for by the way in which the milk was sold, and holding the facts detailed above to be a good excuse under the section, refused to convict the respondent.

The Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 9, enacts as follows:

No person shall, with the intent that the same may be sold in its altered state, without notice, abstract from an article of food any part of it so as to affect injuriously its quality, substance, or nature, and no person shall sell any article so altered without making disclosure of the alteration under a penalty in each case not exceeding twenty pounds.

McCall, Q.C. and *A. Gill* for the appellant.—The magistrate

ought to have convicted. The facts proved by the respondent afford no answer to a charge under the section. Previously to 1875 there were a great many cases on the earlier Acts which showed that the onus of proving that the sale was to his prejudice was on the purchaser; but now the burden of proof is on the seller, and he must establish one of the statutory defences given by sect. 25. The second part of sect. 9 is distinct from the first, and it is under the second part only that the respondent is charged. No allegation of intent is necessary, and the question of intent is immaterial. The object of the Legislature was to protect the public, to insist on purchasers being supplied with genuine articles, and to stop the selling of weakened and impure ones. They quoted *Webb v. Knight* (36 L. T. Rep. N. S. 791; 2 Q. B. Div. 530); *Betts v. Armstead* (16 Cox C. C. 418; 58 L. T. Rep. N. S. 811; 20 Q. B. Div. 771); *Pain v. Boughtwood* (16 Cox C. C. 747; 62 L. T. Rep. N. S. 284; 24 Q. B. Div. 353); *Fecitt v. Walsh* (65 L. T. Rep. N. S. 82; (1891) 2 Q. B. Div. 308).

Dale Hart for the respondent.—The information discloses no offence; the appellant has confused sects. 6 and 9. This information ought to have been under sect. 6; under sect. 9 the appellant has to show and allege that the article of food has been altered with the intent stated in the early part of that section. The case of *Betts v. Armstead* (*ubi sup.*) was decided on sect. 6, and the case of *Pain v. Boughtwood* is distinguishable. In any event that case ought not to be followed; no counsel appeared there for the respondent, and the decision being that of a court of co-ordinate jurisdiction cannot bind this court. He also referred to *Nicholls v. Hall* (28 L. T. Rep. N. S. 433; L. Rep. 8 C. P. 322).

LORD COLERIDGE, C.J.—I am of opinion that the justices were wrong, and that the case must be remitted to them. The facts are shortly as follows: The milkseller buys, I assume honestly, milk which is sent up from the country, he pours it into a large pail or pan, and out of that serves it in small quantities to his customers; it is found that there is a tendency, if the milk is not stirred, for the cream to rise to the top, and in consequence for the milk below to become denuded of some of its richer elements. The seller knows this, and he sells the milk in that condition. Possibly he does not gain by this, he may be selling milk that is almost all cream at the same price as the lower and poorer portion. But the Act of Parliament is for the benefit of the buyer, its object is to insist on his being able to buy genuine articles containing all the proper quantity of the elements of which they are composed. Here it is admitted that, not fraudulently, but by the operation of the laws of nature, the milk was in fact 83 per cent. lower in nutritive parts than it ought to have been. If the construction of the respondent could prevail, this would follow: suppose a pan two feet high, then if nothing is done persons served out of the upper twelve inches will get

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milk of a much better quality than that served out of the residuum. Those persons who get the milk of the lower and poorer half will get an inferior article, not what they ought to have or think they have, or ask to have. That is what happened here, and the question is whether these facts constitute a good defence under the statute. Now sect. 9 of the statute enacts that "No person shall"—I leave out the intent—"abstract from an article of food any part of it so as to affect injuriously its quality, substance, or nature." Here the seller had abstracted a part so as to affect injuriously the quality of the milk. Then the statute goes on to say, "No person shall sell any article so altered without making disclosure of the alteration." That is the clause which is applicable here, and the defendant has so sold without disclosure. It is said that he has not offended against the Act, because the Act says "with the intent that the same may be sold in its altered state without notice," and that, therefore, however much a person may have altered, if he did not while altering contemplate selling, he would have a right to sell. To my mind that would make utter nonsense of the Act, and to construe it so would be to deprive the public of its protection. I should have come to this decision if the question had been bare of authority, but it is not bare. The case of *Pain v. Boughtwood* (*ubi sup.*) is directly in point, and Grantham and Charles, JJ. overruled the same objection. Strictly speaking we are not bound to follow the decision of a Court of co-ordinate jurisdiction, but the great convenience of avoiding conflicting rules and decisions of Courts of equal authority causes the decisions of Courts of co-ordinate jurisdiction to be received with the greatest deference; and in case of a conflict power is given under the Judicature Act to form a large court of five judges, and decide the question once for all. If I had seen any reason to think *Pain v. Boughtwood* (*ubi sup.*) was wrongly decided, I should have used that power, and contrived to have this case heard by a full court. It seems to me, however, to be a right decision, and I think, both on authority and on the Act of Parliament itself, this appeal ought to be allowed.

WRIGHT, J.—If sect. 9 had stood by itself and formed the whole Act I should have come to a different conclusion; but, when one looks at the history of the law on this subject, there is great reason to think that Parliament framed this section so as to exclude the necessity for proving guilty knowledge. In *Fitzpatrick v. Kelly* (28 L. T. Rep. N. S. 558; L. Rep. 8 Q. B. 337) it was held that knowledge was immaterial; and again in the next year, 1874, there was the case of *Roberts v. Egerton* (30 L. T. Rep. N. S. 633; L. Rep. 9 Q. B. 494), in which it was proved that the parties were ignorant of what was done to the goods in China, but it was held quite unnecessary to prove anything in the way of knowledge. In the face of those decisions was passed the Act of 1875, and Parliament, knowing those cases, framed the section on which this case arose. I not

only concur in, but I feel bound by, the decision in *Pain v. Boughtwood*.

Appeal allowed. Case remitted to the magistrate.

Solicitors for the appellant, *Caprons, Dalton, Hitchin, and Brabant*.

Solicitor for the respondent, *Ricketts*.

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COURT OF APPEAL.

Thursday, Dec. 17, 1891.

(Before Lord ESHEE, M.R., LOPES and KAY, L.JJ.)

REG. v. SIE F. YOUNG AND OTHERS (Justices of the County of London). (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Appeal to the Court of Appeal—“Criminal cause or matter”—Rule nisi for mandamus to hear summons under the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49)—Discharge of rule nisi by the Queen's Bench Division—Appeal—Judicature Act, 1873, s. 47.

The defendants granted a summons upon the application of an inspector, under the Weights and Measures Act, 1878, against a person alleged to have false weights in his possession, but subsequently refused to hear it. A rule nisi was granted against them by the Queen's Bench Division for a mandamus commanding them to hear and determine the summons. The rule was afterwards discharged. Upon an appeal by the prosecutors to the Court of Appeal a preliminary objection was raised by the defendants that that Court had no jurisdiction to hear the appeal:—

Held, that this was an appeal from a judgment in a “criminal cause or matter,” and that by sect. 47 of the Judicature Act, 1873, the Court had no jurisdiction to hear the appeal.

THIS was an appeal from a judgment of the Queen's Bench Division (Day and Grantham, JJ.), discharging a rule nisi for a mandamus directing the defendants, justices of the county

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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of London, to hear and determine a summons under the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49).

On the 24th day of June, 1891, upon an application by an inspector under that Act, the defendants granted a summons against a certain person, who was alleged to have false weights in his possession, to appear on the 6th day of July to answer the matter.

On the 6th day of July the defendants, acting on an intimation that they had received from the Home Secretary, refused to hear the summons.

A rule *nisi* for a *mandamus* directing them to hear and determine the summons was granted by the Queen's Bench Division on the application of the London County Council; but afterwards, on the defendants showing cause, it was discharged.

The London County Council appealed.

Sir *Edward Clarke* (S.-G.) and *H. Sutton*, for the defendants, raised a preliminary objection that this was an appeal from a judgment of the Queen's Bench Division in a "criminal cause or matter," and that consequently, under sect. 47 of the Judicature Act, 1873, the Court had no jurisdiction to hear the appeal.

Finlay, Q.C. and *Horace Avory* for the appellants.—This is not an appeal, it is a request for a *mandamus*. The only question here is whether the magistrates have declined jurisdiction, whether it is their duty to hear and determine this summons. *Ex parte Schofield*, (1891) 2 Q. B. 428, was an appeal from a refusal of the Queen's Bench Division to grant a rule *nisi* for a *mandamus* directing a magistrate to state a case under the Public Health Act, 1875. That case has no application here. In all the reported cases it will be found that an attempt was being made to vary the result of some criminal proceeding. [*KAY*, L.J.—*Reg. v. Tyler*, a very recent case, is against you, reported 65 L. T. Rep. N. S. 662; (1891) 2 Q. B. Div. 588. *LOPES*, L.J. referred to *Reg. v. Fletcher*, 13 Cox C. C. 358; 35 L. T. Rep. N. S. 538; 2 Q. B. Div. 43.]

Lord *ESHER*, M.R.—Again I think we must stand by the words which this court has used in former cases when a question has arisen on the meaning of the words "criminal cause or matter" in sect. 47 of the Judicature Act, 1873. In the case of *Ex parte Alice Woodhall* (59 L. T. Rep. N. S. 841; 20 Q. B. Div. 832) I used these words: "I think that the clause of sect. 47 in question applies to a decision by way of judicial determination of any question raised in or with regard to proceedings, the subject-matter of which is criminal, at whatever stage of the proceedings the question arises." Here a question has been raised with regard to proceedings the subject-matter of which is criminal, as the question is, whether magistrates are to be compelled to go on with criminal proceedings, and a judgment has been pronounced in the proceedings which is appealed against here. *Ex parte Schofield*, (1891) 2 Q. B. 428, was no doubt not quite the same case as the present; it was an appeal against the

refusal of the Divisional Court to grant a rule *nisi* for a *mandamus* to compel a stipendiary magistrate to state a case in a proceeding under sect. 91 of the Public Health Act, 1875. I find that there I said: "Is that, or is it not, a decision by way of judicial determination of a question raised in or with regard to proceedings, the subject-matter of which is criminal? I think that this refusal was such a decision, and that the question arose at the stage where the Queen's Bench Division refused the application for a *mandamus*." Applying those words here I think the discharge of the rule *nisi* by the Queen's Bench Division was a judicial decision with regard to a criminal matter, and that the refusal to grant a *mandamus* was a stage in the proceedings. This case is exactly within the interpretation placed on the words of sect. 47 by the court in *Ex parte Woodhall* (*ubi sup.*) and *Ex parte Schofield* (*ubi sup.*), and there is therefore no jurisdiction in this Court to entertain the appeal. An appeal to this Court lies only in civil, not in criminal matters.

LOPES, L.J.—I am of the same opinion. The object of the Legislature in this section was to separate the civil jurisdiction of this Court from criminal matters. The case comes within the explanation of "criminal cause or matter" which was given in *Ex parte Woodhall* (*ubi sup.*). I entirely agree with the words quoted by the Master of the Rolls in *Ex parte Schofield* (*ubi sup.*): "The result of all the decided cases is to show that the words 'criminal cause or matter' in sect. 47 should receive the widest possible interpretation. The intention was that no appeal should lie in any 'criminal matter' in the widest sense of the term." *Reg. v. Tyler* (65 L. T. Rep. N. S. 662; (1891) 2 Q. B. 588) is a very recent case in which it was held that no appeal lay to this court from an order discharging a rule *nisi* for a *mandamus* to a magistrate who had refused to hear a summons under the Companies Act, 1862. We have no jurisdiction to hear the appeal, and it must therefore be dismissed.

KAY, L.J.—It is objected that this appeal is an appeal from a judgment of the Queen's Bench Division in a criminal cause or matter. That Court refused to grant a *mandamus* to compel magistrates to hear a criminal matter. How then can it be said that this appeal is not one from a judgment in a criminal cause or matter? Decisions on the meaning of the words have been referred to which lay down the law very clearly on this point, and those decisions are authorities binding on us. It is plain that we have no jurisdiction to hear the appeal, which must therefore be dismissed.

Appeal dismissed.

Solicitor for the prosecutors, *W. A. Blasland.*

Solicitor for the defendants, *The Solicitor to the Treasury.*

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v.
SIR F. YOUNG
AND OTHERS
(JUSTICES OF
THE COUNTY
OF LONDON).

1891.

Practice—
Appeal—
Jurisdiction
of Court of
Appeal—
Criminal
cause or
matter—
Judicature
Act, 1878,
s. 47.

QUEEN'S BENCH DIVISION.

Friday, Oct. 30, 1891.

(Before MATHEW and SMITH, JJ.)

HORNSBY v. RAGGET. (a)

Gaming—Betting—Keeper of beerhouse—Permitting user of room for betting—Betting Houses Act, 1853 (16 & 17 Vict. c. 119), ss. 1 and 3.

The respondent the keeper of a public-house, permitted a bookmaker and his clerk on five different days to use the bar and the taproom in the public-house for the purpose of betting upon horse races with persons resorting thereto. Respondent was present on the occasions and permitted such uses. No specific place in the bar or taproom was occupied by the bookmaker or his clerk for that purpose; and they had no interest or property in the premises.

Held, that the respondent was liable to be convicted for an offence within the meaning of sect. 3 of the Act for the Suppression of Betting Houses, 1853.

Whitehurst v. Fincher (17 Cox C. C. 70; 62 L. T. Rep. N. S. 433; 54 J. P. 565); Snow v. Hill (15 Cox C. C. 737; 52 L. J. 95, M. C.; 14 Q. B. Div. 588) distinguished.

CASE stated by a metropolitan police magistrate.

Frank Raggett, the respondent, was charged upon the information of George Hornsby, an inspector of metropolitan police, for that he, being the occupier of a certain house, to wit, the Chimes beerhouse, did unlawfully, knowingly, and wilfully permit the same to be used by other persons, whose names were unknown, for the purpose of betting with persons resorting thereto, contrary to sect. 3 of the Act 16 & 17 Vict. c. 119, intituled "An Act for Suppressing Betting Houses."

At the hearing of the information the following facts were proved:

The respondent was on the date named in the information the occupier and keeper of a licensed beerhouse called the Chimes situate in Wollett-street, Poplar.

On the 25th day of April, 1891, and on four other days immediately prior thereto, a person who was described as a

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

professional betting man or bookmaker and his clerk were in the bar and taproom of the beerhouse for the purpose of betting, and did there bet with persons resorting thereto upon certain events and contingencies of and relating to certain horse races. The respondent was in the bar. Neither the bookmaker nor his clerk occupied any specific place in the bar or taproom (which were public rooms), and no evidence was given to show that the bookmaker or his clerk had any interest or property in the premises or any part thereof, or in the keeping, management or tenancy thereof, or of the bar or taproom, or used any part of the house except the taproom, and the public portion of the bar, and then not exclusively but in common with the ordinary customers of the house and the public thereto resorting.

Upon the evidence above stated, the magistrate found as a fact that the bar and taproom of the beerhouse were used by the bookmaker and his clerk for the purpose of betting with the persons resorting thereto, and of receiving money as the consideration for an agreement, express or implied, to pay money on events or contingencies relating to horse races, and that the respondent knew of and permitted such user.

It was contended on the part of the defendant that the user by the bookmaker and his clerk did not constitute an offence by the bookmaker or his clerk within the meaning of the Act 16 & 17 Vict. c. 119, ss. 1 and 3, by reason of the case of *Whitehurst v. Fincher* (62 L. T. Rep. N. S. 433; 54 J. P. 565) and *Snow v. Hill* (52 L. J. 95, M. C.; 14 Q. B. Div. 588), and that therefore the respondent had not committed any offence against sects. 1 and 3 of the Act by permitting the user.

It was contended for the prosecution, first, that the bookmaker upon the facts proved had committed an offence within 16 & 17 Vict. c. 119, ss. 1 and 3, by reason of the decisions in *Eastwood v. Miller* (30 L. T. Rep. N. S. 716; 43 L. J. 139, M. C.; L. Rep. 9 Q. B. 440), *Haigh v. Town Council of Sheffield* (31 L. T. Rep. N. S. 536; 44 L. J. 17, M. C.; L. Rep. 10 Q. B. 102), and *Slatter v. Bailey* (36 J. P. 374); and, secondly, that the respondent, upon the true construction of the sections and upon the facts found, was guilty of the offence charged in the information in permitting the bookmaker to use the premises for the purpose of betting with persons resorting thereto, even if the bookmaker was not himself guilty of an offence under the sections.

The magistrate was of opinion that, by reason of the decisions in *Whitehurst v. Fincher* and *Snow v. Hill*, the bookmaker could not on the evidence have been convicted of an offence under sects. 1 and 3 of the Act, and that consequently it was not an offence against the sections for the respondent to permit the bookmaker to use the beerhouse in the manner described. He therefore dismissed the information subject to the case.

The question upon which the opinion of the High Court was desired was, whether upon the above statement of facts the

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magistrate came to a correct decision in point of law, and, if not, what should be done in the premises.

By 16 & 17 Vict. c. 119, s. 1 :

No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keepers thereof, or any person using the same . . . betting with persons resorting thereto, &c.

By sect. 3 :

Any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them; or any person who, being the owner or occupier of any house, room, office, or other place, shall knowingly or wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid or either of them shall . . . be liable to a fine not exceeding 100*l*.

C. F. Gill (Poland, Q.C. with him) for the prosecution.—The learned magistrate refused to convict the respondent under 16 & 17 Vict. c. 119, s. 3, for permitting the user of the premises for the purposes of betting, because he considered he had not used any fixed place for the purpose of betting with persons resorting to the house. The magistrate, however, found all that was necessary to constitute a user, and bring the offence within 16 & 17 Vict. c. 119. He found as a fact that the bookmaker used the bar and taproom, the landlord permitting him to do so, for the purpose of betting. It is clear, therefore, that the respondent permitted the use of a room in his house, contrary to the section of the Betting Houses Act. This public-house was practically a betting-house within the meaning of the statute. The case that influenced the magistrate against convicting the respondent was *Whitehurst v. Fincher*, where the position of the publican was not dealt with. In the cases of *Eastwood v. Miller* (30 L. T. Rep. N. S. 716; 43 L. J. 139, M. C.; L. Rep. 9 Q. B. 440) and *Hargh v. The Town Council of Sheffield* (31 L. T. Rep. N. S. 536; 44 L. J. 17, M. C.; L. Rep. 10 Q. B. 102) the occupier of inclosed grounds who permitted persons to bet on sports taking place upon the inclosed grounds, was convicted under the statute. These cases have always been acted upon until the decision in *Snow v. Hill* (54 L. J. 95, M. C.; 14 Q. B. Div. 588). There it was held that a person, not the occupier or owner of the ground, who moved about the field and made bets, was not liable to be convicted of using "a place" for the purpose of betting, within the meaning of the statute. The position of the owner or occupier of the field was not dealt with. There was a case before Hawkins, J., *Reg. v. Preedy, Love, Leston, and James*, tried at the Central Criminal Court in 1888, but not reported (a); that case was similar to this. The doubts that have arisen have been from a too liberal interpretation of the

(a) In the case referred to Hawkins, J., upon an application for a case to be reserved for the consideration of the Court for Crown Cases Reserved, delivered an exhaustive judgment (a report of which will be found at p. 433, *post*) upon the question whether a person, who did not occupy any specific portion of the premises he is charged with having used for the purpose of betting, can be said to have used the premises for such purposes.

decision in *Whitehurst v. Fincher*. I submit that the facts found in the present case bring it within the Betting Houses Act, 1853: (*Dogget v. Catternes*, 11 L. T. Rep. N. S. 422; 12 L. T. Rep. N. S. 355; 11 Jur. N. S. 243; 34 L. J. 159, C. P.; 19 C. B. N. S. 765; *Shaw v. Morley*, 11 Cox C. C. 128; 19 L. T. Rep. N. S. 15; 3 Ex. 137; *Bows v. Fenwick*, 30 L. T. Rep. N. S. 524; L. Rep. 9 C. P. 339; 43 L. J. 107, M. C.; 43 L. J. 160, C. P.; *Galloway v. Mairies*, 45 L. T. Rep. N. S. 763; 8 Q. B. Div. 275; *Reg. v. Cooke*, 51 L. T. Rep. N. S. 21; 13 Q. B. Div. 377; *Davis v. Stephenson*, 17 Cox C. C. 73; 62 L. T. Rep. N. S. 436; 24 Q. B. Div. 529.)

Lyon for the respondent.—The respondent permitted no particular place to be used, and no particular place was used; it was no fixed and ascertained place. The person using the public-house was the bookmaker; he had no right or interest in any part of the house. The persons who go in and make bets would be liable for their "use" of the place for the purpose of betting just the same as the bookmaker, if he were liable, but the bookmaker could not here be liable according to *Snow v. Hill* (54 L. J. 95, M. C.; 14 Q. B. Div. 588), as he was not using an ascertained place for the purpose of betting. In *Whitehurst v. Fincher* (62 L. T. Rep. N. S. 433; 54 J. P. 565) there was a finding by the magistrate that the man used the place for the purpose of betting; and that the finding of the magistrate here is that the bookmaker and his clerk used the place for the purpose of betting, and that the respondent knew it. The respondent, however, did not keep this public-house for the purpose of betting: (see *Reg. v. Cook*, 51 L. T. Rep. N. S. 21; 31 Q. B. Div. 377.) In *Eastwood v. Miller* money was deposited with the landlord. Lush, L.J. in that case said: "What was done was done with the consent of the appellant, who was the sole occupier of the inclosed ground;" and further on, that "there was enough to justify the magistrates in coming to the conclusion that the owner of these premises did permit them to be used for the purpose of betting as well as for the purpose of pigeon-shooting." It was also on the same grounds that there was a conviction in the case of *Haigh v. The Town Council of Sheffield* (31 L. T. Rep. N. S. 536; 44 L. J. 17, M. C.; L. Rep. 10 Q. B. 102). Here the respondent received no money for permitting the offence, and this, I submit, is of the essence of the offence.

Gill in reply.

MATHEW, J.—This appeal must be allowed. The magistrate ought to have convicted the respondent. The question in the case turns upon sect. 3 of 16 & 17 Vict. c. 119. The facts were that the defendant, the occupier of a public-house, permitted a bookmaker and his clerk to come to his public-house and use two rooms in it for the purpose of betting. The magistrate did not convict the respondent because he thought that the bookmaker could not have been convicted, inasmuch as the bookmaker did

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not use any particular or fixed part of the room for his purposes ; and this is the contention on behalf of the respondent. It is, however, unnecessary to go to authority for any judicial interpretation of the word "place." The statute also deals with the user of a "room," and a "room" was used here, not exclusively no doubt, by the bookmaker, but the statute does not speak of exclusive user. It is sufficiently shown in this case that the occupier permitted the bookmaker and his clerk to use the taproom and bar for the purpose of betting, and he should have been convicted. There is no decision which prevents us coming to this conclusion. We have been pressed with the decision in *Whitehurst v. Fincher*, a case in which I took part. The distinction between that case and this is obvious. In that case the facts only amounted to this: that the defendant was found betting in the public-house on three occasions, and that as betting in public-houses is not prohibited by the Act, we thought the defendant should not have been convicted. Here the magistrate finds that the house was habitually used for betting purposes.

SMITH, J.—I agree. This was unlawful betting within the purview of the Betting Houses Act. This Act was not passed to put down all betting, but to prevent persons from keeping betting-houses and other places where betting might be regularly carried on. Here a betting man and his clerk were clearly in the public-house for the purpose of betting. All betting is not unlawful, but if a man uses any house, office, room, or other place for the purposes of betting, he is within the Act, and any person being the owner or occupier of any house, room, office, or other place, who knowingly permits the same to be used for the purposes of betting, comes also within the Act. No doubt the bookmaker in this case cannot be said to have occupied any "place," any fixed or ascertained spot, for the purpose of betting, but we have here to deal with the case of using a room. The case in which I took part (*Snow v. Hill*) has nothing to do with this case; that case only put a definition on what was a fixed place. In this case there was a "room" used by the bookmaker for the purpose of betting, the publican (the respondent) allowed it, and he is liable, and therefore ought to have been convicted by the magistrate.

Case remitted to the magistrate.

Solicitors for the appellant, *Wontner and Sons*, for the Commissioner of Police.

Solicitors for the respondent, *Peckham, Maitland, and Beckham*.

CENTRAL CRIMINAL COURT.

Nov. 21, 1888.

(Before HAWKINS, J.)

REG. v. FREEDY AND OTHERS. (a)

Gaming—Illegal betting—“Unlawful user of house or place for the purpose of betting with persons resorting thereto”—“Place”—Person making bets in bar-room of public-house—The Betting Houses Act, 1853 (16 & 17 Vict. c. 119), ss. 1 and 3.

In order to support a conviction under 16 & 17 Vict. c. 119, s. 3, for unlawfully using a house, room, or place, for the purpose of betting with persons resorting thereto, it is unnecessary that there should be evidence of such house, room, or place having been opened and kept or used previously to the occasion in question for the purpose of such illegal betting as is forbidden by sect. 1; in other words, the illegal user forbidden by sect. 3 is not necessarily of a house, room, or place which is already a common nuisance and a common gaming-house under ss. 1 and 2. It is also immaterial that the principal user of the house, room, or place is for a legitimate object, if in fact it is also used for the prohibited purpose.

Semle, that user of premises for the purpose of illegal betting for one day only is a sufficient user within the meaning of sect. 3.

The term “place” in sect. 3 does not necessarily mean one particular spot, but may include a place extending over a considerable area of ground. Such place need not be bounded by a definite line, but it cannot be of unlimited extent, and is to be confined to the area occupied by the persons congregated together and resorting to it; and such place is further to be limited to a space upon which, if anyone carried on business there as a betting man, he might fairly and reasonably be said to be carrying on such business in the immediate presence of the persons resorting to such space.

Doggett v. Catterns (34 L. J. 159, C. P.) distinguished.

The bar-room of a public-house is a “place” within the meaning of sect. 3, and semle, user of a bar-room is user of a “house” for the purposes of the said section.

Held, further, that for the purposes of illegal user within the meaning of sect. 3 it is not necessary that the delinquent should remain stationary in the place so used, he may use the place by moving about within its area.

(a) Reported by ARTHUR E. GILL, Esq., Barrister-at-Law.

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—"Place"—
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bar of public-
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Snow v. Hill (15 Cox C. O. 737; 52 L. T. Rep. N. S. 859; 14 Q. B. Div. 588; 54 L. J. 95, M. O.) distinguished. (a)

ERNEST WILLIAM PREEDY, Levy Love, Henry Ernest Sexton, and William Henry James having claimed to be tried by a jury under the provisions of the Summary Jurisdiction Act, 1879, s. 17, were indicted at the Central Criminal Court for, firstly, that they on the 17th day of May, 1888, being persons then using a certain house, namely a public-house called "The Three Compasses," unlawfully did use the said house for the purpose of betting on horse races with persons resorting thereto contrary to the Betting Houses Act, 1853 (16 & 17 Vict. c. 119), s. 3.

The second count in the indictment was similar to the first, except that "place" was substituted for "house," and "the bar-room of" was inserted before "a public-house called the Three Compasses."

The indictment contained other and similar counts charging the like offences on the 19th, 22nd, 23rd, 24th, and 25th of May, and was tried before Hawkins, J. in the month of August, 1888.

The material facts were as follows:—

"The Three Compasses" is a licensed public-house situated in Dalston-lane, Hackney.

Neither of the defendants was either an owner, occupier, or keeper of the house, or in any way connected with the care, management, or conduct of the business thereof. In the house there is a public bar where liquors are sold, and to which customers of the public-house resort. This bar consists of a counter with a space in front of it, and it is entered from the lane. Within this space there stood, on each of the days in question, a movable table separate from the counter, and round the table two or three chairs were placed on which anybody might sit who pleased. On the 17th day of May, 1888, about mid-day, the defendant Sexton was in the bar in the space between the counter and the entrance; he remained three-quarters of an hour, sometimes standing and at other times seated at the table. A number of persons came in, with some of whom transactions of the following character took place, viz., each of such persons placed money upon the table accompanied or followed by a slip of paper with writing upon it, which Sexton took up and put into his pocket; later on, viz., between nine and ten p.m. of the same day, Sexton and several of the persons with whom he had these transactions in the morning were again at the same place, and to some or all of them the defendant Sexton paid money.

On the 19th May the two defendants Sexton and James were together in the bar about one p.m. when several persons came in, some of whom had transactions with Sexton and some with James precisely similar to those above mentioned.

Similar transactions took place at mid-day on the 22nd day of

(a) See also *Hornby v. Raggett* (ante, p. 428; and 66 L. T. Rep. N. S. 61; (1892) 1 Q. B. 20; 61 L. J. 24, M. O.), and *Whitehurst v. Fincher* (17 Cox C. O. 70; 62 L. T. Rep. N. S. 488).

May both with Sexton and James, and afterwards Sexton made entries on a piece of paper which he took from and returned to his pocket. In the evening of the same day James, in conversation with the landlord of the house, said, "You can afford to treat me out of the winnings to-day." This the landlord refused to do. James then said, "There have been long odds laid on the field to-day in the first part of the racing."

On the 23rd day of May, which was the first day of the Manchester Whitsuntide Race Meeting, a little before mid-day Sexton and James were together in the bar when two similar transactions took place between Sexton and persons present; after which one man placed four pieces of paper, each apparently containing money, on the table saying, "All on King Monmouth." Sexton opened the papers and put them and the money into his pocket. James then exclaimed, "Look out; here comes old Fletcher," meaning a detective officer of that name, who soon afterwards entered the house, whereupon Sexton and James left, but returned again a quarter of an hour after Fletcher had taken his departure. An observation was then made by the landlord to them that "Florentine" was his fancy for the Salford Handicap.

On the 24th day of May transactions passed between persons who came into the bar and Sexton and James, who were there together, similar to those of the 19th day of May.

Poland appeared on behalf of the prosecution.

Geoghegan on behalf of the defence.

The arguments sufficiently appear from the judgment.

The prisoners Sexton and James were all found guilty by the jury, but judgment was postponed by Hawkins, J. for the purpose of considering whether he should reserve a case for the consideration of the Court of Crown Cases Reserved.

Judgment was delivered on the following 21st day of November.

HAWKINS, J.—This case is undoubtedly of considerable importance to all persons following the avocation of public betting men; for, although the law is generally stated with great care and accuracy in Mr. Stutfield's very valuable book on the law of betting and wagering, and although the 3rd section of 16 & 17 Vict. c. 119, has frequently been the subject of legal decision in the Courts, I can find no general rule laid down in any of the reported cases which affords much assistance to those, who while they desire to follow that calling, desire also to keep within the law. I need not repeat at length what I said in the *Queen v. Cook* (L. Rep. 13 Q. B. Div. 385) as to the state of things which led in the year 1853 to the passing of the "Act for Suppression of Betting Houses." That Act was passed, as stated in the preamble, for the suppression of a kind of gaming which had then of late sprung up, tending to the injury and demoralisation of improvident persons, by the opening of places called Betting Houses or Offices, and the receiving of money in advance by the

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owners or occupiers of such houses or offices on the promise of the latter to pay money on events of horse races and like contingencies. With a view to stop such gaming, the first section of the statute enacts that: "No house, office, room, or other place shall be kept or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for, or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto, or for the purpose of any money or valuable thing being received by or on behalf of such occupier, keeper, or person as aforesaid, as or for the consideration for any assurance, undertaking, promise, or agreement express or implied to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the payment or giving by some other person of any money or valuable thing in any such event or contingency as aforesaid." It then goes on to enact: "Every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law;" and by sect. 2 it is enacted that every such house, &c. shall be deemed to be a common gaming house within 8 & 9 Vict. c. 109. The third section, being that under which the defendants are here charged, enacts that: "Any person who being the owner or occupier of any house, office, room or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them, and any person who being the owner or occupier of any house, room, office, or other place shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them, and any person having the care or management of, or in any manner assisting or conducting the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them, shall be liable" to the penalties provided by the Act. The chief objection urged before me for the defendants was, that there could be no illegal user of a house or place for the purpose of betting within the meaning of sect. 3, unless such house or place had already been opened, and was then kept or used in the sense of being wholly or partially appropriated or devoted to the purposes forbidden by sect. 1; or in other words, that there could be no such illegal user of any house or place which was not at the time of such user a common nuisance and a common gaming house under sects. 1 and 2. Having carefully considered this objection I have come to the conclusion that it is untenable. The object of the first section undoubtedly was to render liable to prosecution for causing a public nuisance any person who having the control, over any house or other place,

used or sanctioned its use for the illegal purposes mentioned. The third section, however, had, as it seems to me, a very much more extensive object in view, viz., to render liable to pecuniary penalties not only those who being owners or occupiers themselves kept or used or permitted the use of any house or place for the prohibited purpose, but also those who, though not owners or occupiers, actually used any house or place for such purpose, and also those who in any manner assisted in conducting the illegal business for which such house or place was so kept or used. The language of the first paragraph of sect. 3 is not so clear as it might have been, but its meaning is rendered intelligible enough if the words "or a person using" are made to follow the words "occupier of." The first paragraph would then run thus: "Any person who being the owner or occupier of, or a person using any house, office, room, or other place shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them shall be liable, &c. There is nothing in sect. 3 to indicate that the words "any house" are intended to be read in the limited sense contended for by the defendants, or otherwise than according to their ordinary signification. In my opinion the intention of the Legislature was to make the use by any person of any house, room, or place for either of the prohibited purposes a penal offence, and I think the language employed is sufficient for the purpose. No doubt some colour is given to the objection by the cases of *Clarke v. Hague* (8 Cox C. C. 324), *Morley v. Greenhalgh* (3 B. & S. 374; 32 L. J. 93, M. C.) in which it was held that it was no offence within sect. 3 of 12 & 13 Vict. c. 92, an Act for the prevention of cruelty to animals, for a person to assist in cock fighting elsewhere than in a place kept or used for that purpose. Each of those cases, however, turned upon the peculiar language of a proviso in the section under which those convictions were made, and a careful perusal of them will show that they have no bearing upon the objection I am now discussing. I am fortified in my opinion by the dicta of the judges in *Haigh v. Sheffield* (L. Rep. 10 Q. B. 102). Assuming, however, the defendant's construction of the third section to be the correct one, I am of opinion that there was an abundance of evidence that the bar was used both by the landlord and the defendants for the prohibited purposes. That it was used by the landlord, in the sense that it was partially appropriated or devoted to such purposes, might be inferred from his knowledge and his tacit permission to make such use of it. To keep or permit the use of such premises even for one day might suffice: (see *Rudge v. Parsons*, 3 B. & S. 381; *Haigh v. Sheffield*, L. Rep. 10 Q. B. 106.) But in this case day after day, and hour after hour, the betting transactions went on in the landlord's presence. The fact that the principal user of the bar was for the customers of the public-house is immaterial, if it was also used with the sanction of the occupier for the illegal gaming charged: (see *Eastwood v. Miller*, L. Rep.

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9 Q. B. 440; *Haigh v. Sheffield*, *supra*; and *Jenkes v. Turpin*, 13 Q. B. Div. 505.) It may, however, be urged that the bar of the public-house in which the betting was carried on was neither a "house," as it is described in the first count, nor a "place," as it is described in the second count, within the meaning of the statute. In my opinion it is both. It certainly is part of a house, and it was, as far as the evidence went, the only part of the building used by the customers who resorted thereto for the purpose of procuring drink; and in popular language those who so resorted to the bar would be said to use the house. Assuming, however, the bar not to be properly described as a house, there was, in my opinion, overwhelming evidence to justify the finding it to be a "place," by which description it is mentioned in the second count. What constitutes a "place" within the meaning of the statute is a question which has several times occupied the attention of the courts. In all the cases it will be found that one essential requisite to the constitution of such a place is that it must, to adopt the expression of Brett, J. in *Bows v. Fenwick* (L. Rep. 9 C. P. 339), be "fixed and ascertained." It must, too, be a place to which at the time when the offence is charged to have been committed persons were resorting, though with what primary object they were so resorting is, in my judgment, immaterial, the Act is silent upon that point. The temptation to gamble by betting was what the Act was intended to check, and the temptation to bet would be equally held out by a professional betting man plying his avocation in a crowd of persons assembled for the most innocent purpose unconnected with sport, as it would in a crowd of persons gathered together to witness the sport of racing. It need not be enclosed within walls or fences, or bounded by any defined line. Furthermore it may extend over a considerable area, even acres of ground. Were it otherwise many racecourses might be pointed out, upon which a betting man might with impunity carry on such operations as the statute was intended to suppress. It must not, however, be supposed that I intended to say that a place to come within the statute may be unlimited in its area; on the contrary I am of opinion that, though it may be bounded by no defined line, it must, nevertheless, be limited in extent, to the area occupied by the persons congregated together, and resorting to it, and to such a space that the person carrying on his business there as a betting man might fairly and reasonably be said to be doing so in the immediate presence of those so congregated together. Whether that which is charged as a place within sect. 3 satisfied those requirements is a question of fact to be determined by the tribunal before which the matter comes for adjudication, having regard to the circumstances of each particular case. Illustrations of my views will be found in some of the cases to which I am about to refer. It is true that in one or two of the cases expressions of judges may be found (not material to the question before them) which might at first sight be

thought to indicate their opinion to be, that the word "place" in the statute means some particular ascertained spot, just sufficient for a man to sit or stand on. Thus in *Bows v. Fenwick* (L. Rep. 9 C. P. 339), where it was held that a stool over which was a large umbrella fixed into the ground, placed on Chester Racecourse, and upon which a person stood and betted constituted a "place," Lord Coleridge, C.J., said: "It was an ascertained spot where the appellant for the time at least, carried on the business of betting." Again in *Gallaway v. Maries* (8 Q. B. Div. 275) where a box not in any way fixed to the ground was placed in the inclosure attached to the grandstand at Four Oaks Park, Grove, J. made the observation, "I think all the cases show that a place to be within the statute must be a fixed ascertained place, occupied or used so far permanently that people may know that there is a person who stands in a particular spot indicated by a certain definite mark with whom they may bet." I can hardly think these learned judges intended by these expressions to lay it down as law that nothing would satisfy the term place unless it was some particular spot on which a person stood, or which was appropriated by him, exclusively for his own use—as a stall or standing in a fair or market would be—or that they meant to convey more than this, that a place must be fixed and ascertained. I can find no authority for saying that the word "place" ought to have so limited an interpretation put upon it; indeed, there is direct authority to the contrary which I shall presently cite. In the cases of *Bows v. Fenwick* and *Gallaway v. Maries*, as also in *Shaw v. Morley* (L. Rep. 3 Ex. 137), in the latter of which the person charged occupied and used a small unroofed plot of land furnished with a desk adjoining the inclosure at Doncaster, and which was held to be an office, the parties were, in fact, using particular spots for their illegal gambling; but, although a fixed spot occupied exclusively by one person is undoubtedly a place, it does not follow that a "place" must of necessity be restricted to one particular spot. The cases of *Eastwood and Miller* (L. Rep. 9 Q. B. 440) and *Haigh v. Sheffield* (10 Q. B. 102) appear to be to me direct authorities, that a person may be convicted of using a "place" for the purpose of betting, though his betting operations are not confined to a single spot but are carried on over a considerable area of ground. The appellant, in the first of these cases, was occupier of an inclosure containing between 3 and 4 acres, called the Borough Park Ground at Dewsbury, to which people were admitted by ticket to witness a pigeon shooting match; among the people so admitted were two bookmakers, who in the inclosure to the knowledge of the appellant pursued their avocation by betting on the match; but there is no suggestion in the case that they stood on any definite spot. The Court held there was sufficient evidence that the inclosure was a place within the meaning of the Act; and also, that the appellant permitted it to be used for the purpose of

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betting, Lush, J. expressly stating that the fact that it was a large inclosure, whether a quarter or half an acre or three acres, could not affect the question. In *Haigh v. Sheffield* the charge against the appellant was that he, being the occupier of the Hyde Park Cricket Ground at Sheffield, knowingly permitted one Trickett and others to use the said place for the purpose of illegal betting. The facts were that the appellant was tenant of the ground, within which on the day named in the proceedings a foot race took place, and among the spectators Trickett and several other professional bettors, by the tacit permission of the appellant, stood on chairs and stools in various spots and pursued their calling. The court, consisting of Blackburn, Mellor, and Lush, JJ., were unanimous in holding the appellant liable. In these two cases the areas held to be places were of considerable extent. It is true that in the last-mentioned case the bettors may be said to have used spots; but I have already pointed out that it was not so in *Eastwood v. Miller*. These two cases, it is true, were cases in which the appellants were charged with permitting the user of their premises for illegal betting, but they apply equally to charges against those who actually use premises for illegal gaming; for, unless there be an actual unlawful user by some one there can be no unlawful permission to use. What constitutes unlawful user I shall shortly hereafter point out. Before, however, I pass from the question of what is a place, I must say a few words respecting the case of *Doggett v. Catterns* (34 L. J. C. P. 159; 17 C. B. N. S. 669; 19 C. B. N. S. 765) since the judgment of the Court of Exchequer Chamber then delivered has often been cited as deciding that a man who day after day, at a table placed under a clump of trees in Hyde Park, carried on his business of betting, receiving money in advance on bets on horse races, could not be legally convicted of using a place within the meaning of sect. 3. It is quite true that there are expressions used in the judgment of the Exchequer Chamber which afford colour to that notion. Carefully considered, however, the case will be found to decide nothing of the sort. It was not the case of a prosecution under sect. 3 at all, but was an action brought under sect. 5 of the Act to recover back a sum of money which the plaintiff had deposited with the defendant on bets on horse races. Now, the 4th section of the Act imposes a penalty not exceeding 50*l.* upon any person being the “owner or occupier of any house,” &c., opened, kept, or used for the purpose aforesaid, or any person acting for or on behalf of such owner or occupier, or any person having the care or management or in any manner assisting in conducting the business thereof, who shall receive any money or valuable thing as a deposit on a bet, &c.,” and sect. 5 enacts that “any money or valuable thing received by any such person aforesaid as a deposit on any bet” shall be deemed to have been received to or for the use of the person from whom the same was received, and may be recovered back. Not a word was said in either of these two sections as to

recovering back money received by a person merely using the house or place. As therefore money can only be received back from the owners or occupiers or persons acting for them, it stands to reason that it is a condition precedent to the recovering back of the money that the person from whom it is sought to be recovered shall be an owner or occupier of the house, &c., where the money was deposited. This accounts for the opinion expressed by Pollock, C.B., and assented to by Crompton, J., Channell, B., and Blackburn, J. that a place to be within the statute (*i.e.*, a place within sects. 4 and 5) must be capable of having an owner or occupier. It is true that, in *Doggett v. Catterns*, Bramwell, B. (whose views were shared by Mellor, J. and Pigott, B.) rested his judgment on a different ground, *viz.*, that it was not an ascertained place of resort for gambling, an expression of which Lord Coleridge, in *Bows v. Fenwick*, seemingly approved, on the ground that there was no ascertained place within the ambit of the park in which the defendant carried on his avocation. As a decision upon the question whether the plaintiff was entitled to recover under sect. 5 it is obviously right. If read as an opinion upon a question not before the court, *viz.*, whether the defendant might have been convicted under sect. 3. it is difficult to say that it is satisfactory. For my own part I think it is not essential to a place within sect. 3 that it should have an occupier, or that the person who uses it for the illegal purpose should have permission so to do from either owner or occupier. The right or title to be upon the place seems to me to be utterly immaterial, if in fact there is an illegal user of it. This seems also to have been the opinion of Brett, J., who in *Bows v. Fenwick* treated a suggestion that the place was not a fixed one because the appellant paid no rent and was liable to be moved on by the police as entitled to no weight. Nothing would be easier than to evade the operation of sect. 3 if a person could defend himself upon the ground that he was a mere trespasser on the place used. If such were the law a man might locate himself at the corner of a street, or in an unoccupied shed, or on a vacant piece of ground on a railway platform, and there carry on his betting operations with impunity, if only he did so without the knowledge of the owner or occupier. Whereas, if he did so with the permission of the owner or occupier, both would be liable to a penalty. There is nothing to be found in the Act which in my judgment warrants such a construction of it. I address myself now to the question what is an unlawful user of a place under sect. 3. It was not certainly the intention of the Legislature to make all betting illegal, and it is just as lawful now as it ever was for persons to bet together casually at any place, and as often as, and to any extent they please. The mischief that the Act was pointed at was as expressed by Erle, C.J., in *Doggett v. Catterns*: "The habit of using a particular place by persons skilled in gambling and betting, for the purpose of luring the ignorant and imprudent to the ruinous

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courses to which the vice of gambling too frequently leads," and, for the purpose of checking that habit, it was forbidden to any person to use any place for the purpose of systematically carrying on a business of betting with or receiving deposits on bets from persons resorting thereto. It is not the mere act of betting frequently, or with many persons; it is the carrying on the business of betting and announcing such business to those assembled, and inviting the persons resorting to the place to bet with such bettors which the law was intended to suppress. With reference to the purposes for which the use of a place is forbidden it would seem from the preamble of the Act that the legislation was directed to that kind of gaming which for the sake of brevity I will call the receiving money by way of deposit on bets. The first section, however, forbids the use of a place either for that purpose, or for the purpose of betting with persons resorting thereto, and sect. 3 makes it a personal offence to use a place for such purposes or either of them. It is clear, therefore, to my mind that the operation of the 3rd section is not limited by the preamble, notwithstanding the slight intimation of doubt, especially by Blackburn, J. in *Haigh v. Sheffield* (L. Rep. 10 Q. B. 106, 107). With reference to what constitutes a user of a place, I am of opinion that it is not necessary that it should be confined to one particular spot, within the ambit of the place or that the business should be announced in any particular manner, or that the use should be confined to one particular person. A man may just as well use a place by walking about from spot to spot within the area occupied by the persons resorting thereto, as he may by seating himself on a high stool in one particular spot. Nobody would say that a man did not use a house because he shifted his operations from room to room as he found it most convenient, or that he did not use a room because, instead of sitting on a chair or standing in a fixed spot he walked up and down it. The same observation would apply to a large barn (which would clearly be a place within the meaning of the statute). What earthly difference could it make if the roof were taken off the barn and the walls pulled down so as to leave a bare plot of ground? Indeed, in very many places, a betting man might more effectually use a place for his illegal operations by moving about, than he could by standing, as it were, fixed to one spot. It is obvious that by so doing he could make his presence and calling known to a greater number of the crowd. And it must not be forgotten that upon many places devoted to racing, the winning post is often shifted, and with it many of the assembled multitude shift themselves. I need not dwell upon the immateriality of the same place being used by several different persons at the same time. Ten persons may ply their calling as easily as one. As to the mode of using a place for the illegal purposes mentioned it is immaterial what particular means are resorted to for those purposes. A man may stand on a stool in one spot, he may sit at a desk; or he may walk here and there in

all parts of the place amongst the assembled multitude, indicating in any way he may think fit or most attractive, his business or avocation, and his readiness to bet with the persons who are assembled at the place. To use all parts of a place in this manner, seems to me to be a more effectual use of it than to confine himself to a solitary spot. He may use as his attraction or advertisement, a tall painted hat, or adopt other singularity of dress, or may use a placard or a flag, or exercise his voice to announce and call attention to his readiness to bet in the manner forbidden; which of these methods he adopts is absolutely immaterial. Whether there has been such a user for illegal purposes is again a question of fact to be determined in each case by the particular circumstances surrounding it. *Eastwood v. Miller* affords an illustration of what I mean. And I would refer also, without repeating them, to the observations I made in delivering my judgment in *Reg. v. Cook* (13 Q. B. Div. 385) and to which I adhere. I am aware that the case of *Snow v. Hill* (14 Q. B. Div. 588), unless carefully read, appears to be in conflict with those observations, but carefully read it is by no means so. In *Snow v. Hill* the appellant was charged with using a certain place, to wit, a field, at West Brompton, in Staffordshire, with the purpose of betting with persons resorting thereto. The field was five acres in extent, and was let to a committee for holding dog races therein. The appellant, in common with many other persons, paid for admission to the field, and betted there with several persons; he had no particular location, nor did he exhibit anything to indicate that he was a professional bettor, but moved freely about in that part of the field to which he was admitted like the rest of the public. There was not even proof that he was a professional bettor at all. The stipendiary magistrate of Stoke-upon-Trent convicted him upon the authority of *Eastwood v. Miller*, but the Court (Lord Coleridge and Smith, J.) quashed the conviction upon the ground that the appellant was not using the field for the purpose of betting with persons resorting thereto, but was himself merely one of the persons resorting thereto, and as such not within the 3rd section of the Act. I need hardly say that I heartily concur in this judgment; but there is a wide difference in the two cases. In *Reg. v. Cook* the men said to have been using the place were clearly plying their avocation as professional betting men, by their voices and actions. In *Snow v. Hill* the appellant was merely conducting himself as one of the public, walking about making promiscuous bets with those he chanced to meet, which he had a perfect right to do; for, as I have already said, a man may without infringing the law frequent every racecourse or cricket match in England, and bet with whomsoever he pleases, in sums great or small, provided he does not do that which the statute now under discussion has forbidden, and which I have already discussed at length. Applying the law to the evidence in the present case, I think the conviction is not in any respect

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open to objection. I think the bar of the public-house might for the purposes of this case reasonably be described as a "house" or as a "place," or both; and it was the resort of all persons who desired to become customers of the public-house, and by some who came purposely to deposit their money, and bet with the defendants. I place no stress upon the fact that there was a table in it at which some at least of the transactions took place, for I am of opinion that the defendants equally used the place whether they sat at the table or moved about among the customers of the house; and although there was no noisy proclaiming of the defendant's betting business, no placard, no stool, desk, or umbrella, the transactions themselves afforded abundant proof that the defendants were there using the bar for both the prohibited purposes. I think, then, the convictions were right, and I entertain no such doubt upon the subject as ought to induce me to reserve a case for the consideration of the Court of Criminal Appeal.

Application for case for consideration of Court for Crown Cases Reserved refused.

QUEEN'S BENCH DIVISION.

Friday, Dec. 11, 1891.

Before Lord COLERIDGE, C.J. and SMITH, JJ.)

Ex parte DAISY HOPKINS. (a)

Practice—Jurisdiction of the Vice-Chancellor's Court at Cambridge — Spinning-house — Charter of the University of Cambridge, 26th April, 1561—13 Eliz. c. 29, s. 2.

D. H. was arrested at Cambridge by the University constables, and charged before the Vice-Chancellor of the University, with "walking with a member of the University." This charge was read over to her, and she pleaded "not guilty." Evidence was given as to her being seen walking with a gentleman of the University, and also as to her being a woman of bad character. The Vice-Chancellor committed her for fourteen days to the Spinning-house, and the warrant of commitment stated that she

(a) Reported by ALFRED H. LEFROY, Esq., Barrister-at-Law.

had been charged with and convicted of "walking with a member of the University." It appeared that the above was a common form adopted in the Vice-Chancellor's Court when it is intended to charge a woman with walking with such a member for "immoral purposes," and that for a long time it has been taken to mean such a charge, and that it was intended so to charge and convict the said D. H., and so to enter the conviction on the warrant of commitment:—

Held, on application for writs of habeas corpus and certiorari, that the proceedings in the Vice-Chancellor's Court were irregular; that the appellant had not been charged within the words of the charter as "suspected of evil;" that she had been charged with an offence not within the jurisdiction of the Vice-Chancellor; that she had not been charged with any other offence, nor had the charge been altered or amended; and that consequently the conviction was bad.

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IN this case a rule *nisi* for two writs had been obtained on behalf of one Daisy Hopkins, one directed to the Vice-Chancellor of the University of Cambridge, the Rev. Frederic Wallis, one of the pro-proctors of the said University, and the keeper of the Spinning-house or House of Correction in the University and town of Cambridge, calling on them to show cause why a writ of *habeas corpus* should not issue directed to the said keeper to bring up the body of the said Daisy Hopkins, who was detained in the said Spinning-house under the warrant of the Vice-Chancellor of the University for walking with a member of the University.

The other writ was one of *certiorari* directed to the Vice-Chancellor of the said University to send up the record of the conviction of the said Daisy Hopkins. The application was made on the ground that "the commitment disclosed no offence against the common or statute law of the realm or against the charter of the University."

It appeared that the applicant was arrested one night at half-past ten by the University constables and taken to the Spinning-house upon the charge of "walking with a member of the University," and the next morning she was brought before the Vice-Chancellor, and the above charge in writing was read over to her and she was told to plead to it, and she pleaded not guilty. Evidence was given that she was seen walking with a member of the University, who was called, and stated that he spoke to the prisoner, and asked her to take him to her rooms. Other evidence as to her character was also produced. On the evidence given before him, the Vice-Chancellor committed her for fourteen days to the Spinning-house. The warrant, for such committal, was in the following terms:

To the keeper of the Spinning-house or House of Correction in the University and town of Cambridge. Whereas Daisy Hopkins hath been apprehended by the Rev. F. Wallis, one of the pro-proctors of the University, within the limits and jurisdiction thereof, and hath been this day brought before me and charged with walking with a

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member of the University in a public street of the town of Cambridge and within the precincts of the University, which charge, as well upon the information of the Proctor as upon the examination of the said F. Wallis, and after having heard what the said Daisy Hopkins had to allege in her defence, I do now adjudge to be true. These are, therefore, to require and command you to receive into your custody the said Daisy Hopkins and her safely to keep in your said Spinning-house for fourteen days.

The Court granted a rule *nisi*. The Vice-Chancellor and the Proctor both made affidavits in answer to the application. The affidavit of the Rev. F. Wallis, the Proctor, was in these terms :

I, the Reverend Frederick Wallis, clerk in holy orders, Fellow of Gonville and Caius College, in the University of Cambridge, make oath and say as follows :

1. I am one of the pro-proctors of my said University, and in that capacity, on the 2nd day of December instant, I entered a charge against Daisy Hopkins of walking with an undergraduate.

2. This form of charge is repeatedly to be found in the records of the Vice-Chancellor's Court, and is frequently adopted when the offence charged is that a woman is in company with an undergraduate for an immoral purpose, and I intended to make that charge in this case.

3. In making the said charge I had reasonable grounds for believing, and did believe, that the said Daisy Hopkins was in company with the said undergraduate for an immoral purpose. I knew her to be a reputed prostitute.

The Vice-Chancellor's affidavit was sworn in these terms :

I, John Pelle, Esq., Doctor of Letters, Master of Christ's College, in the University of Cambridge, and Vice-Chancellor of the same University, make oath and say as follows :

1. On Thursday, the 3rd day of December instant, I presided as judge in the Vice-Chancellor's Court at the hearing of a charge preferred by the Rev. Frederick Wallis, one of the pro-proctors of the said University, against Daisy Hopkins.

2. The said Daisy Hopkins was charged by the said Frederick Wallis with walking with an undergraduate. This charge, the form of which I believe is well known in the records of the said court, is always understood to mean that the woman charged was in company with an undergraduate for an immoral purpose, and I so understood it in this case.

3. From the evidence of the witnesses called before me, I came to the conclusion that the said Daisy Hopkins was a person of bad character, and I was satisfied that she was in company with the undergraduate for an immoral purpose. I accordingly convicted her on the charge as I understood its meaning, and I thereupon ordered her to be imprisoned in the Spinning-house for fourteen days, as I was entitled to do under the powers conferred upon me as judge of the said court.

4. In filling up the warrant for the detention of the said Daisy Hopkins I followed the usual form of words as contained in the charge, but I intended to record that I had adjudged her to be guilty of the offence that she, being a person of bad character, was in company with the said undergraduate for immoral purposes.

The jurisdiction of the Vice-Chancellor to issue such a warrant as aforesaid is based upon the charter granted by Queen Elizabeth on the 26th April, 1561, to the Chancellor, masters, and scholars, and their successors, of which the following is the material part :

Per seipsoe, aut per eorum deputatos, officarios, servientes, et ministros, seu per eorum aliquem sive aliquos, de tempore in tempus ad omnia tempora, tam in die quam in nocte, ad eorum beneplacitum, ex nunc in perpetuum, ad faciendum scrutinium, scutationem et inquisitionem, tam per diem quam per noctem, quotiescunq. et quancumq. eis videbitur, expedire in prædictâ villâ Cantebriagiæ, et in suburbis ejusdem, etc., de et pro omnibus et publicis mulieribus, pronubis vagabondis, et aliis personis de malo suspectis, ad dictam villam et superbia, ferias, mercatus nundinas et loca prædicta seu ad eorum aliquem venientes seu confuentes; ac omnes et singulas illas personas quas iidem cancellarius, magistri et scholares aut eorum successores, aut eorum deputati, officarii, servientes, et ministri, seu eorum aliqui seu aliqua, super aliquod hujusmodi scrutinium, scutationem, sive inquisitionem,

reas seu suspectas de malo, invenerint, puniendi per imprisonmenta corporum suorum, banitionem, et aliter, prout cancellario dicta universitatis Cantebriegie, aut ejus vicemgerenti pro tempore existenti videbitur punire, etc.

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This charter was confirmed in 1570 by 13 Eliz. c. 29, entitled "An Act for the incorporation of both Universities."

The *Attorney-General* (Sir R. Webster, Q.C.) (*Cohen*, Q.C. and *Rawlinson* with him) appeared on behalf of the University to show cause against the rule.—The application for the rule *nisi* was apparently made on the supposition that the applicant was only tried upon the charge of merely walking with a member of the University, which, of course, would be no charge at all. In reality, however, the court had convicted her for so walking with immoral purposes. The affidavits of the Vice-Chancellor and pro-proctor clearly show that that was the charge that the proctor intended to prefer and which was really heard and tried, and on which the applicant was convicted. The charge was one within the jurisdiction of the Vice-Chancellor under the charter conferred by Queen Elizabeth, and which expressly gave the Vice-Chancellor power to deal with loose women. [Lord COLLEIDGE, C.J.—What do you understand to be the meaning of the word "pronubis"?] Originally it had not a bad meaning, but eventually it has come to be used as meaning "procuresses." The expression "walking in the streets with members of the University" has come to be understood in a bad sense—that is, walking with them for an immoral purpose, and, in fact, it has been so used and applied, as many cases on record show. In *Kemp v. Neville* (4 L. T. Rep. N. S. 640; 10 C. B. Rep. N. S. 528) the charge was similar—that is, "walking with a member of the University." It is manifest the words then were understood as if the words "for an immoral purpose" were read in with them. The applicant is clearly "persona de malo suspecta" within the meaning of the charter, and that being so, the Vice-Chancellor had jurisdiction, and being a judge of a court of record his conviction could not be questioned. [Lord COLLEIDGE, C.J.—What is your authority for saying the Vice-Chancellor's Court is a court of record?] It was so held in *Kemp v. Neville*, and it was also decided in that case that no warrant was necessary, and that the Vice-Chancellor could have ordered the woman into custody orally. But we are here to consider whether the Vice-Chancellor has power to order a young woman to be imprisoned against whom there is evidence of her being of an immoral character for "walking with a member of the University." In *Kemp v. Neville* there was no evidence that the woman was other than a respectable woman, but there was evidence that she was going out with others for immoral purposes. The affidavits in this case show that the applicant was tried upon the charge as it was and had been for years commonly understood.

Poland, Q.C. (*Dr. Cooper* with him) appeared in support of the rule.—The motion for this rule was made on the ground that the

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applicant was not charged before the Vice-Chancellor with any offence known to the law, and that she could not be committed for another offence that was known to the law, but with which she had not been charged. The whole point is that she has been imprisoned upon a charge never made against her. The only charge made against her was, "walking with a member of the University." That charge was in writing, and was read over to her, and to that and that alone she was called upon to answer, and to that answer she pleaded "not guilty." The offence with which she was charged is not one known to the law. But the Vice-Chancellor has stated in his warrant that it was upon the charge made in writing that he convicted her. It is submitted that the Vice-Chancellor cannot convict a person of an offence mentioned in the charter unless that offence is specifically charged, and the onus is on the other side to show that such an offence was charged. The Vice-Chancellor said she was convicted on the charge as he understood it, and that he intended to convict her of being a person of bad character, and that she was in company with the said undergraduate for immoral purposes. But such charge was never made against the applicant. She never was told that the charge against her was that she was a "bad character." What the Court held in *Reg. v. Hughes* (4 Q. B. Div. 614) was, that if a person is before justices, and a charge is then made against him, the justices may hear that charge. The charge may be made different from that on which the party was arrested, but then for that very reason it must be distinctly stated before the evidence is taken. The charge on which the conviction follows must be made (*Martin v. Pridgeon*, 1 E. & E. 778; 28 L. J. 179, M.C.) where the prisoner charged with riotous behaviour, was convicted of drunkenness, and the conviction was held bad. [SMITH, J.—What do you say the charge of walking with a member of the University is to be taken to mean?] It is to be taken in its plain natural meaning, and it discloses no offence. It is not allowable to say "because it shows no offence, it must be understood to mean something else which would be an offence," which would allow of a person being arrested on one charge and tried and convicted of another. This is illegal and contrary to justice: (*Reg. v. Brickhall*, 10 L. T. Rep. N. S. 385; 33 L. J. 156, M. C.; *Reg. v. Baker*, 47 J. P. 666; *Turner v. The Postmaster-General*, 5 B. & S. 756.) In those cases the prisoners were told to plead to fresh charges, and it was held that a new charge must be distinctly made, and the prisoner told that he is being tried on it. But in this case no charge was made at all that is known to the law; and if a charge is made showing no offence it cannot be eked out and altered by what was "understood" or "intended" to be charged: (*Leeson v. General Council of Medical Education* 61 L. T. Rep. N. S. 849; 43 Ch. Div. 366.)

Lord COLERIDGE, C.J.—There are two applications before us: one to bring up the body of Daisy Hopkins as being imprisoned in the Spinning-house at Cambridge without legal authority;

and, secondly, to bring up, for the purpose of quashing, all the proceedings which took place in the Vice-Chancellor's Court at Cambridge prior to the imprisonment of Daisy Hopkins upon the order of the Vice-Chancellor. These two matters must be kept separate and distinct; and I will endeavour to keep them separate and distinct, because it might be that we should think it right to issue the *certiorari* to quash the proceedings, and yet it might be that the Vice-Chancellor, or the authorities at Cambridge, might have a perfectly good answer to make in the way of a return to the *habeas corpus*. Now, giving ample credit to the University authorities for the manner in which they have proceeded, have they or have they not kept within the letter of the law? A person is brought before the Vice-Chancellor in a court partly created by charter, and partly created by statute of Queen Elizabeth, which statute I assume from the statement of facts in the case of *Kemp v. Neville* by Erle, C.J. is very little more than an echo of the words of the charter of Queen Elizabeth. Therefore one may look to the words of the charter, cited in the case of *Kemp v. Neville*, as showing the limits within which the authority of the Vice-Chancellor is to be exercised. Now, sitting in this court created by charter and by statute, he has to administer disciplinary jurisdiction, and a person is brought before him as having violated that disciplinary jurisdiction, and as having subjected herself to unlimited fine and imprisonment. She is charged before him in the only document that is before us with having walked with a member of the University; she is convicted without any alteration being made in that charge. She is, I should rather say, convicted upon the charge made upon the charge-sheet. She is then sent to the Spinning-house, which I understand is in fact the gaol of the University of Cambridge, and is ordered to be imprisoned there for fourteen days under an order of the Vice-Chancellor, which recites in the same way that she had been brought before him and had been charged with walking with a member of the University, and having heard what she had to allege in her defence he says, "I adjudge the charge to be true." The charge is set out in the warrant which is sent to the keeper of the Spinning-house. Now the Attorney-General said, as it would be expected he would say, that such a charge, which is a charge of no offence known to the law, was not the charge tried, and that nobody would suppose that a person simply walking with a member of the University, who might be that member's mother or sister or wife or friend, was guilty of an offence against the law which would justify the Vice-Chancellor in imprisoning him or her; but he said, and he said no doubt with truth, that that was not the charge which the Vice-Chancellor supposed he was trying, that was not the charge which the proctor supposed he was preferring, and probably they have not expressly said what they meant. The Attorney-General said it was a matter of great probability that everybody connected with the case, from the

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beginning to the end of it, knew that the charge so stated and so limited was not the real question that was being tried before the Vice-Chancellor. Further, as my learned brother has observed more than once in the course of the argument, the depositions show, the course of the trial shows, that not this shadowy and perfectly innocent matter was being inquired into, but the far graver charge of her being a person of immoral character, and of her having been guilty of immoral conduct—to put it in popular words. That was the substance of the thing which was charged against her, and which was being tried before the Vice-Chancellor. Well, I have no doubt that what the Attorney-General says is true. But then, unfortunately, the Vice-Chancellor has told us that this form of words was not used by accident. He says that this form of words was not used by accident, and that he does not desire to correct it at all, but that it has been for a long time used in the criminal proceedings of the Vice-Chancellor's Court to mean a great deal more than the words express—that for a great length of time the words have been used to import that such a person as this was a person suspected of evil, and had been consorting with a member of the University for purposes of immorality. All I can say is that that does not appear to me (and I will explain why in a moment) to be an argument or contention open to the Vice-Chancellor. It is natural enough, as far as he, the individual gentleman, is concerned, that finding a state of things which everybody understands, and which everybody has proceeded upon, he should not make any alteration, and should go on as other Vice-Chancellors have gone on before him—quite natural. But when the point is raised, and when the question is finally put to us—will that do?—I am obliged to answer in the negative. Now, I freely admit the cases are overwhelming to show that if a person who is brought before magistrates or any competent authority, and is charged before that competent authority with something which that authority is competent to try, and which is within the jurisdiction of that authority, and is tried for that which it is within the jurisdiction of that authority to try, and is convicted by that authority, then how he gets there, and on what particular charge he gets there, is immaterial so long as there is jurisdiction to try the charge, and so long as the person who is tried is charged with the offence for which he is convicted or for which he is tried. That legal position seems to me to be established beyond all doubt by the case of *Reg. v. Hughes*, which I cite, not because I was a party to it, but because it was a decision of ten judges, and therefore it is difficult to get a decision of greater authority; and there are other cases to the same effect. It is well established, and therefore in this case if there had ever been a charge which brought the applicant within the jurisdiction of the Vice-Chancellor and his Court, what she had been brought there originally for would to my mind have been immaterial; and the cases have shown that being charged

with a matter which the Vice-Chancellor had jurisdiction to try, and having been tried on that charge, there would have been a perfectly good answer capable of being made by the Vice-Chancellor or the keeper of the Spinning-house at Cambridge to the *habeas corpus*. It may be that there would not be the same answer to the *certiorari*; but that would become immaterial, because if those proceedings were quashed, the record, as is well-known, can be drawn up at any time. The answer to the *habeas corpus* might have been drawn up on a record which, if it could have truly stated what I have already mentioned, would have been to my mind a complete answer to the *habeas corpus*. It may be that the Attorney-General would be wrong upon the *certiorari*, and yet in the real substance of the matter he would be right if that answer could be truly made to the writ of *habeas corpus*. But I do not think that answer can be truly made. Now for that purpose we must look for a moment only at the words of the charter. The charter gives power to the Chancellor, masters, and scholars of the University of Cambridge from time to time, and so on, to make scrutiny when they think right in the aforesaid town of Cambridge and its suburbs "de et pro omnibus et publicis mulieribus pronubis vagabondis et aliis personis de malo suspectis" and so on. Those held "rea seu suspectas de malo" they may punish by fine and imprisonment. Those are the words therefore to be considered, as it appears to me; and to justify the proceedings of the Vice-Chancellor it is necessary that the person must have been charged within these words in the charter as being at all events a person (whether a public woman I know not) "rea seu suspecta de malo" or she must be charged with having been there and with having done what she did for some immoral purpose. It appears to me that unless that appears somewhere, and in substance or in fact is charged against the person before the Vice-Chancellor at Cambridge, the Vice-Chancellor cannot proceed. Here what the Vice-Chancellor says about that is that he did not choose—"we have for years and years not chosen to adhere to the words of the charter; they are often immaterial; they are, many of them, surplusage; and sooner than write out, every time we have to give a decision, all or a great part of these words of the charter, we have been accustomed to use a comprehensive phrase which to our minds includes all the rest of the conditions precedent that the charter lays down." The question is, have they acted within well-ascertained principles of law? It is said that the case of *Kemp v. Neville* shows that they have. I think not. The case of *Kemp v. Neville*, decided by judges of the highest authority, and with whom I entirely concur, it is to be observed, proceeded first of all upon a totally different state of legal incident. It was an action for false imprisonment. It was an action against the Vice-Chancellor for having done that which he had no right to do, and in doing which he had broken the law, and damages were sought to be recovered against

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him for that breach of the law. The point to be decided was whether the Vice-Chancellor at Cambridge under this charter and the statute of Elizabeth had or had not by his action transgressed the law so as to make himself liable to an action for false imprisonment. The Court held, and, if I may presume to say so, perfectly rightly held, that he had not made himself liable to an action for false imprisonment, and that upon many grounds; that he had acted as a judge; that he had acted within his judicial authority; that he had acted perfectly *bonâ fide*; that the record, if it had been drawn up, would have shown that at any rate he was perfectly capable of making a record which would have absolutely justified him. Therefore the court very properly held that no action would lie against him. It is true that the judgment in the case (a most instructive one) deals with a number of other points; but the real point in the case was whether the second plea was made out. The second plea set out the charter to which I have referred, and stated that it was validated by an Act of Queen Elizabeth, and said that the Vice-Chancellor had acted to the best of his ability within the authority given him by that statute; and the court and everyone was of opinion that he had done so; and that was an answer to the action in that case. In several of the cases which are cited by the Chief Justice in the course of his judgment it appears that complete defence to an action for false imprisonment and complete return to a writ of *habeas corpus* are by no means convertible terms; because in both of the two cases which are referred to in which actions were brought, in the one case successfully and in the other case not successfully, there had been a *habeas corpus*, and in both cases the *habeas corpus* either was resisted, and ineffectually resisted, or it was not resisted at all. Nothing therefore, could show more clearly that the question of *habeas corpus* and the question of defence to an action for false imprisonment raise very different considerations indeed. Now, was there ever here a charge made which would justify the action of the Vice-Chancellor? I think there never was. I am of opinion that both these rules must be made absolute.

SMITH, J.—If in administering what I believe to be the law of this country, I could discharge this rule, I certainly should do so because the point upon which I think it should be made absolute is a small point. The technical point which I am about to name has nothing whatever to do with the real merits of this case. The duty of the Vice-Chancellor in my judgment has been admirably performed in the present case, but inasmuch as I have to decide upon the jurisdiction of a criminal Court, of a Court of record with large powers of fine and imprisonment, I do not feel myself at liberty to (if I may use the word) circumvent those authorities that have been brought before me by Mr. Poland. Now, I wish to state what is my view of this case, first saying that I agree with every word that has fallen from my Lord as to the manner in which the Vice-Chancellor in this case has exercised his

jurisdiction, and the powers which he had to exercise. The real substance of this case is this: Is this woman Daisy Hopkins in lawful custody or not? That is the real point that we have to decide; and the first point taken is that she is in unlawful custody because the warrant of commitment upon the face of it shows no offence. Now, that point seems to me to be amply answered; because it was held in *Kemp v. Neville* that the Vice-Chancellor's Court being a Court of record, there was no necessity for a warrant of commitment at all, but that the Vice-Chancellor, *sedente curiâ*, by oral command, without any warrant made at the time, could commit a person charged before him to gaol. And if this case had rested there, in my judgment it would have been a good answer for the gaoler to say "the Vice-Chancellor ordered me to detain this woman for fourteen days in the Spinning-house which is a legal gaol for the Vice-Chancellor's Court at Cambridge." Therefore that point evaporates as regards the illegality of the warrant. Then Mr. Poland raises another point; and it is this point which I cannot get over. He says the charge which would authorise the Vice-Chancellor in saying to his gaoler "keep that woman for fourteen days," must be a charge which he had power to adjudicate upon; and, says Mr. Poland, this being a criminal jurisdiction exercised by the Vice-Chancellor, the Vice-Chancellor can try no one, nor can any person exercising criminal jurisdiction in this country try anyone, unless they first charge the person and give the person charged the opportunity of pleading to the charge upon which he is to be tried. There is no doubt that that is the criminal law of this kingdom. Now we come to the question of fact: was any charge made in this case by the Vice-Chancellor to this woman which he had jurisdiction to try? Speaking for myself I have not the slightest doubt that this woman was tried upon a charge of immorality; that there was ample evidence to justify that charge of immorality; and that she was duly convicted upon that charge of immorality. What is more, I go as far as to say that she and her attorney knew perfectly well that she was being tried upon that. But then comes in this technicality: was she ever charged *de facto* with immorality? Now that is the sole technical point in this case which I cannot get over. The Attorney-General stated, and in my judgment he stated truly, that the real point for our consideration was, "could the Vice-Chancellor make a good return to the *mandamus* if it goes;" and he says that the record might be drawn up at any time. So it can, and I think the Vice-Chancellor was quite right in not drawing up the record *in presenti*, but leaving it for after consideration if proper; probably he will never draw it up, because it is a matter of the smallest importance in the view of the judgment of this Court in this particular case. Now, if he could have made a return which was true in fact, I would not have granted this *habeas*, but it comes back to the same thing. In the return he would have had to state "I charged that woman with immo-

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rality; I tried her on a charge of immorality; and I convicted her on a charge of immorality, which was within my jurisdiction." He would have failed, in my judgment, in proving the first allegation, that he had ever charged her with immorality. That is a small point. How did that come about? It is perfectly obvious. For time out of mind in these records of the Vice-Chancellor's Court, instead of putting down the actual delinquencies against these women (and I suppose many of them have been convicted), in mercy to these women they do not keep a record of the actual facts, but they have put down for years and years "walking with a member of the University." I put to Mr. Poland "What do you think that means? Do you think that means walking with a member of the University for good or for evil?" Nobody can put the question without knowing what the answer is. But that is not the point. We are dealing with a criminal jurisdiction. What is the charge which was read out to this woman to which she pleaded "not guilty?" The evidence is all one way. The charge is "walking with a member of the University." Unfortunately they did not go on, as I have no doubt the University will go on after this, to say "a person suspected of evil," so as to bring it within the words of the statute. That is the charge which was read out, and that is the charge which was pleaded to; and no one can say that is a charge (I do not speak of what people knew) which is within the jurisdiction of the University. Now, what does the Vice-Chancellor say when he states upon affidavit what was done? I will read the pro-proctor's affidavit first. He says: "I entered the charge against Daisy Hopkins 'walking with an undergraduate.'" That is the charge he entered, and that is the charge that appears on the charge-sheet. Then says the Vice-Chancellor: "The said Daisy Hopkins was charged by the Rev. Mr. Wallis with walking with an undergraduate." It is quite true, as I have already said, the Vice-Chancellor knew right well, and so did everybody down there that they were going to try this woman on a charge of immorality. But they never charged her with it; and that shows what a small point this is in my judgment. But, inasmuch as the authorities bind me to this, that in exercising a criminal jurisdiction there must be a charge made, and the charge pleaded to, upon which the person is convicted, in my judgment that charge has never been made in this case. I agree with what my Lord has said (which is not disputed by Mr. Poland), that if the prisoner is up before the committing magistrate for larceny, and then the Crown wish to go on against him for housebreaking, they can go on against him for housebreaking, he being before the magistrate. But if they do so they must say the charge against him is for housebreaking. That exactly emphasises what they did in this case. They all knew they were going against this woman for immorality; but, in fact they did not put this charge to her, to which she could have pleaded. Therefore, upon that small point,

and upon that small point alone, I think this *habeas* and *certiorari* must go.

Rules absolute for habeas corpus and certiorari.

Solicitors: for the Vice-Chancellor, *Cole and Jackson*, agents for *Francis and Francis*, Cambridge; for the applicant, *Torr and Co.*, agents for *A. J. Lyon*, Cambridge.

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CROWN CASES RESERVED.

Saturday, Jan. 30, 1892.

(Before *HAWKINS, WILLS, CHARLES, LAWRENCE, and WRIGHT, JJ.*)

REG. v. CHAPPLE AND BOLINGBROKE. (a)

Evidence—Aiding and Abetting—Joint indictment—Statements by one prisoner in absence of the other—Admissibility as evidence against both prisoners—Inference by jury—Debtors Act, 1869, s. 13, sub-sect. 2—Practice—Motion to quash counts in an indictment—When motion should be made.

Upon the trial of an indictment in which two persons were charged, the one, a bankrupt, with disposing of goods with intent to defraud his creditors, and the other, the bankrupt's brother-in-law and manager, with aiding and abetting him therein:

Held, that statements made by the bankrupt at the time he obtained the goods were admissible as evidence against both the prisoners, although such statements were made in the absence of the other prisoner:

Held also, that the jury might infer from the relationship proved to have existed between the parties that the prisoner who had received the goods from the bankrupt, and who was therefore charged with aiding and abetting, was at the time he received such goods aware of the fact that the goods had not been paid for by the bankrupt.

Semble, that where it is intended to take objection to any of the counts in an indictment, the proper course is to move to have such counts struck out of the indictment before plea pleaded, and that it is too late to take such an objection at the close of the case for the prosecution.

CASE stated by the Recorder of London:

The prisoners, Frederick Chapple and Charles Bolingbroke,

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

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were charged, Chapple with committing certain offences under the Debtors Act, 1869, and the Bankruptcy Act, 1890, and Bolingbroke with aiding and abetting him therein. It appeared from the evidence that Chapple had carried on business as a tobacconist at 1, Pall Mall, and subsequently also at 29, Cockspur-street, and that Bolingbroke, who was his brother-in-law, was his manager. Chapple, in Aug., 1890, transferred his business to Bolingbroke together with the lease of 29, Cockspur-street, and the stock-in-trade, and having presented a bankruptcy petition against himself, was adjudicated bankrupt on the 18th day of October, 1890. The indictment found against the prisoners contained twelve counts, of which it was admitted on the argument that the 1st, 5th, 10th, 11th, and 12th counts were bad since the offences alleged in them were alleged to have been committed in August, 1890, such offences being offences under the Bankruptcy Act, 1890, which did not come into operation until January, 1891. The 8th and 9th counts charged the prisoners with conspiracy to defraud, and to defeat the object of the bankruptcy statutes.

The 10th and 12th counts had been added without the permission of the court, and the 8th and 9th by the permission of the court granted upon an *ex parte* application.

The 2nd count charged that Chapple did on the 16th day of August, 1890, make a delivery and transfer of certain property belonging to him to Bolingbroke, with intent to defraud his creditors, and that Bolingbroke aided and abetted him therein. At the trial Spiro Damburgi was called as a witness, and stated that in May, 1890, he had found Chapple at 1, Pall Mall, and that Chapple had in the course of a conversation with him ordered 33,000 cigarettes. Damburgi stated also that he had sent the cigarettes to Chapple, at Cockspur-street, in June, that he had afterwards seen the cigarettes in his shop in Cockspur-street, and that Chapple had never paid for them. Arthur Roger Carter was also called as a witness, and said that in January 1890 he had supplied Chapple with 5000 cigarettes, and in May, 1890 with 20,000, and in his evidence repeated a conversation he had had with Chapple in May, in which Chapple had represented that he could sell the lease of his shop for 1000*l*. He stated also that Chapple had never paid for the cigarettes, and that after the transfer of the business to Bolingbroke, he had seen them in the shop in Cockspur-street, Bolingbroke's name being then on the shop front. Bolingbroke had been examined in the bankruptcy proceedings, and in his examination, which was given in evidence had admitted that in May, 1890, the question of the transfer of the business to him had been discussed between Chapple and himself. The prisoners refused to plead to the indictment on the ground that it contained counts which were bad, and the Recorder directed a plea of not guilty to be entered. At the close of the case for the prosecution the counsel for the defence moved to quash the 1st, 5th, 10th, 11th, and 12th counts, and also the 8th and 9th, but the Recorder refused the application,

and the whole indictment was left to the jury, who returned a general verdict of guilty against both prisoners.

The question for the opinion of the court was, if any of the counts were bad, was the evidence of Spiro Damburgi and of Arthur Robert Carter, or of either, admissible on any of the counts that were good.

Avory for the prisoners.—The evidence of Damburgi and of Carter was not given on the counts charging conspiracy, but on the counts which are admitted to be bad. Evidence on the bad counts is not evidence on the good counts. He referred to *Reg. v. Gibson* (18 Q. B. Div. 537.) An act done by Chapple in May, 1890, cannot be evidence of a common design in August, 1890. [WRIGHT, J.—That question was fully considered in *Rea v. Bayley* (1 State Trials, New Series). The act of one conspirator is evidence against him, and the application of the evidence is a matter for the jury.]

Guy Stephenson for the prosecution.—Bolingbroke admitted in his examination in the bankruptcy proceedings that he and Chapple had considered the question of the transfer of the business. As Chapple's manager he must be taken to have known that Chapple had not paid for the cigarettes.

HAWKINS, J.—I am of opinion that this conviction cannot be disturbed. The question we have to decide is, whether the evidence of Damburgi and of Carter is admissible on any of the good counts? Whether the motion to quash the indictment was made too late is immaterial for the purposes of our decision on the point submitted to us. Although it is not necessary that an objection to an indictment should in every case be taken before plea is pleaded, yet both convenience and justice demand that the matter of the indictment which the defendant must answer should be settled. In this case the objection to the indictment was not made until the conclusion of the trial, and was therefore, in my opinion, made too late. I am of opinion that the evidence of Damburgi was admissible on the second count. It was proved that Chapple and Bolingbroke were brothers in law, that in May, 1890, Bolingbroke, being Chapple's manager, discussed with Chapple the arrangement by which Bolingbroke was to take Chapple's business, and Chapple having moved from 1, Pall Mall, to Cockspur-street, the transfer was complete in August. This is the transfer which it is alleged was made in fraud of Chapple's creditors, and in respect of which Bolingbroke is charged with aiding and abetting Chapple. Bolingbroke being Chapple's manager, Chapple ordered 33,000 cigarettes of one man, and 20,000 of another. Whether Bolingbroke knew that Chapple had bought goods and that Chapple had not paid for them was, in my opinion, a question for the jury.

WILLS, CHARLES, LAWRENCE, and WRIGHT, JJ. concurred.

Conviction affirmed.

Solicitor for the prosecution, *Solicitor to the Treasury.*

Solicitor for the prisoner, *Douglas W. Tough.*

RES.

v.

CHAPPLE AND
BOLINGBROKE.

1892.

*Evidence—
Joint indict-
ments—
Statements by
one prisoner
in absence of
the other—
Admissibility
against both
prisoners—
Debtors Act,
1869, s. 13 (3)
—Inference by
jury—Prac-
tice—Time
for moving to
quash counts
in indictment.*

CROWN CASES RESERVED.

Saturday, Jan. 30, 1892.

(Before HAWKINS, WILLS, CHARLES, LAWRENCE, and WRIGHT, JJ.)

REG. v. WILLIAM MOORE AND ALICE BROOKS. (a)

Evidence—Affirmation—Duty of judge—Conditions precedent to affirmation—Oaths Act, 1888.

Where a witness is desirous of making an affirmation instead of taking an oath, it is the duty of the judge presiding at the trial to himself examine the witness, and ascertain that he objects to being sworn on the ground either that he has no religious belief, or that the taking of an oath is contrary to his religious belief. A witness who states that he has a religious belief cannot be allowed to affirm.

CASE stated by the deputy-chairman of the North London Court of Quarter Sessions :—

The prisoners were convicted on an indictment charging them with larceny from the person of Lakhin Dass, a native of India. From the facts stated in the case it appeared that the usher of the court, whose duty it was to swear the witnesses had without the knowledge of the judge asked Lakhin Dass, before he entered the witness-box, whether he wished to be sworn on the Bible or on the Koran, and upon Lakhin Dass declining to be sworn on either, had asked him if he wished to affirm, to which Lakhin Dass assented. Lakhin Dass, before giving his evidence, and without stating to the judge that he objected to be sworn on the ground that he had no religious belief, or that taking an oath was contrary to his religious belief, made an affirmation in accordance with the provisions of the Oaths Act, 1888, sect. 2. In cross-examination Lakhin Dass said :

I am a native of India. I was sworn at the Police-court. I have a religion. I believe in the existence of a God. I respect all religious things. I could swear upon any religious book which recognises the existence of a God. I was sworn at the Police-court on the Bible.

Lall Singh also affirmed without having stated to the judge that he objected to be sworn on the ground that he had no religious belief, or that taking an oath was contrary to his religious belief. In cross-examination Lall Singh said :

I am a Sikh. I have a religious belief. In India I could be sworn on a book called the Granth.

The jury convicted the prisoners, and after they had found

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

their verdict, counsel for the defence objected that the evidence of Lakhin Dass and Lall Singh was not legally admissible, inasmuch as they had made an affirmation instead of taking an oath, neither of them having objected to be sworn on the ground that he had no religious belief, or that the taking of an oath was contrary to his religious belief, and that the conviction was consequently bad. He cited *Reg. v. Gibson* (18 Q. B. Div. 537). The deputy chairman held that the witnesses had been properly allowed to affirm, and that the objection was taken too late.

The questions for the opinion of the Court were: 1st, whether the deputy chairman was right in admitting the evidence of the witnesses Lakhin Dass and Lall Singh, under the circumstances, or whether he or the usher who swore the witnesses was bound to put the questions suggested in sect. 1 of the Oaths Act, 1888, before allowing an affirmation; 2ndly, whether the deputy chairman was right in holding that counsel for the prisoners was too late in taking his objection.

C. F. Gill, who appeared for the prisoners at the trial, stated the facts as *amicus curiæ*.

Germaine for the prosecution. The requirements of the Oaths Act were complied with. The witnesses objected to take the oath, and the case of a witness who objects to take an oath on the ground that it is an oath which is not administered according to the form in which oaths are administered in the religious body of which he is a member is provided for by the second alternative.

HAWKINS, J.—The questions which are submitted to us for our opinion are two: first, whether the deputy chairman was right in allowing the witnesses Lakhin Dass and Lall Singh to give evidence under the circumstances, or whether he or the usher who swears the witnesses was bound to put the questions suggested in the 1st section of the Oaths Act, 1888, before allowing an affirmation; and secondly, whether he was right in holding that the counsel for the defence was too late in taking his objection. It does not appear to us that the deputy-chairman exercised any discretion in the matter. It was the usher who examined the witnesses as to religious belief, and who suggested to them that they should make an affirmation, and we are all of us of opinion that the deputy-chairman was wrong in receiving the evidence of the witnesses under the circumstances. Before allowing the witnesses to affirm, it was the duty of the deputy-chairman himself to ascertain whether they objected to be sworn, and whether they were entitled to make an affirmation in lieu of an oath. To the second question we unanimously answer "no." It may be that the objection might have been taken sooner; it certainly was not taken too late.

WILLS, CHARLES, LAWRENCE, and WRIGHT, JJ. concurred.

Conviction quashed.

Solicitor for the prosecution, *Solicitor to the Treasury.*

REG.
v.
WILLIAM
MOORE AND
ALICE BROOKS.

1892.

Evidence—
Affirmation—
Condition
precedent—
Duty of judge
—Oaths Act,
1888.

COURT OF APPEAL.

Monday, Feb. 1, 1892.

(Before Lord ESHBIE, M.R. and FRY, L.J.)

PAYNE (app.) v. WRIGHT (resp.). (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Appeal—Court of Appeal—Jurisdiction—Order as to roof of buildings—Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), ss. 19, 45, 46, and 47—“Criminal cause or matter”—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 47.

W. was summoned before a metropolitan police magistrate for having covered the roof of a building with a combustible material contrary to the provisions of sect. 19 of the Metropolitan Building Act, 1855, and for not having complied with a notice to amend the defect. The magistrate held that the material was “incombustible” within the meaning of the Act, and refused to make an order upon W., but stated a case for the opinion of the Queen’s Bench Division upon that question. By sect. 47 of the Act, if the magistrates had made an order, W. would have been liable to a penalty for every day that he neglected to comply therewith. The Queen’s Bench Division held that the material was not “incombustible.” W. appealed.

Held, that the decision of the Queen’s Bench Division was a “judgment in a criminal cause or matter,” within the meaning of sect. 47 of the Judicature Act, 1873, as to which no appeal would lie to the Court of Appeal.

THIS was an appeal against the decision of the Queen’s Bench Division (Mathew and Smith, JJ.) upon a case stated by a metropolitan police magistrate.

The respondent, Wright, the managing director of the New Wire Wove Roofing Company, was summoned by the appellant Payne, who was district surveyor under the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), for having covered the roof of a building externally with a combustible material contrary to the provisions of sect. 19, sub-sect. 1, of that Act. A notice in writing, pursuant to sect. 45, had been duly served upon Wright by Payne, requiring him to do such things as were required by the Act to be done, but he did not comply therewith.

The roof of the building had been covered with a material

(a) Reported by J. HERBERT WILLIAMS, Esq., Barrister-at-Law.

known as "Duoline," and the magistrate held that this material was "incombustible" within the meaning of the Act, but stated a case for the opinion of the Queen's Bench Division upon that question.

The Queen's Bench Division (Mathew and Smith, JJ.) decided that the material was not an "incombustible material" within the meaning of sect. 19 of the Act, and remitted the case to the magistrate with that expression of opinion.

Wright appealed to the Court of Appeal.

Horace Ivory for the respondent.—There is a preliminary objection to the hearing of this appeal. This is an appeal from the judgment of the High Court in a "criminal cause or matter," as to which sect. 47 of the Judicature Act, 1873, enacts that no appeal shall lie to the Court of Appeal. The provisions of the Act under which these proceedings were taken, the Metropolitan Building Act, 1855, show that these proceedings were of a "criminal" nature, as explained by the various decisions upon sect. 47 of the Judicature Act 1873. If a builder contravenes the provisions of the Act, and after notice has been served upon him under sect. 45 does not conform thereto, he may be summoned before a magistrate, who may make an order upon him to comply with the provisions of the Act, and if he does not comply with that order he renders himself liable to a fine of 20l. a day; that fine would be recoverable under the provisions of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43). The authorities are clear: It was held in *Mellor v. Denham* (42 L. T. Rep. N. S. 493; 5 Q. B. Div. 467) that an attendance order made under the Elementary Education Act, 1874, in *Reg. v. Whitchurch* (45 L. T. Rep. N. S. 379; 7 Q. B. Div. 534) and *Rook v. Schofield* (*ante*, p. 303; 64 L. T. Rep. N. S. 780; (1891) 2 Q. B. 428) that an order to abate a nuisance, and in *Reg. v. Young* (*ante*, p. 425; 66 L. T. Rep. N. S. 16) that a summons under the Weights and Measures Act, were "criminal" matters. In *Ex parte Woodhall* (59 L. T. Rep. N. S. 841; 20 Q. B. Div. 832) the definition of "criminal cause or matter," is laid down as widely as possible. The result of the decided cases is that, if in any proceedings before justices the ultimate event may be the infliction of a penalty, those proceedings are a "criminal cause or matter." The exception in sect. 47 of the Judicature Act, 1873, "save for some error of law apparent upon the record," applies only where there is a "record," that is, where there has been an indictment in the Queen's Bench Division. Those words were intended only to preserve the old jurisdiction of the Exchequer Chamber in such cases. Here there is no "record" at all.

Cutler, Q.C. for the appellant.—This is not a "criminal cause or matter" within the meaning of sect. 47 of the Judicature Act, 1873. The summons does not ask for the infliction of a penalty, and under sect. 46 of the Metropolitan Building Act, 1855, under which the summons was issued, no penalty can be inflicted. In *Mellor v. Denham* (*ubi sup.*) a penalty had been incurred, and the

PATHE
v.
WRIGHT.

1892.

Practice—
Appeal—
Court of
Appeal—
Jurisdiction
—Criminal
cause or
matter—
Order of
magistrate
under Metro-
politan Build-
ing Act, 1855,
s. 19—Judi-
cature Act,
1873, s. 47.

PAYNE
v.
WRIGHT.

1892.

Practice—
Appeal—
Court of
Appeal—
Jurisdiction
—Criminal
cause or
matter—
Order of
magistrate
under Metro-
politan Build-
ing Act, 1855,
s. 19,—Judi-
cature Act,
1873, s. 47.

liability could not be avoided by compliance; the same observation applies to *Reg. v. Whitchurch* (*ubi sup.*), where a penalty had been incurred. The Act in this case is quite different. Under sect. 46 no penalty can be inflicted; and, if the defendant complies with the order made under that section, no penalty is ever incurred. The case of *Loughborough Highway Board v. Curzon* (55 L. T. Rep. N. S. 50; 17 Q. B. Div. 344), which was not cited in the more recent cases, is in my favour. It was there decided that proceedings before justices for non-repair of a highway were not "criminal," and that an appeal would lie from the judgment of a divisional court upon a special case. *Reg. v. Holl* (45 L. T. Rep. N. S. 69; 7 Q. B. Div. 575) is also in my favour. We come also within the exception of sect. 47 of the Judicature Act, 1873, "save for some error of law apparent upon the record." Here it appears upon the record that the judges in the court below came to an erroneous decision; the record is the summons, the case stated by the magistrate, and the order of the Queen's Bench Division.

Lord ESHBEE, M.R.—We cannot depart from the decision which we gave in *Reg. v. Schofield* (*ubi sup.*), which governs this case. Mr. Cutler says that we shall be putting a narrow construction upon the words of sect. 47 of the Judicature Act of 1873; but, on the contrary, we have always said in this court that we ought to put the widest possible construction upon the provisions of that section. In that case—*Reg. v. Schofield* (*ubi sup.*)—the magistrate, having made an order, under sect. 91 of the Public Health Act, 1875, for the abatement of a nuisance caused by a chimney sending forth black smoke in such a quantity as to be a nuisance, was asked to state a case for the opinion of the High Court; he refused to do so, and an application for a rule *nisi* for a *mandamus* to compel him to do so was refused by the Queen's Bench Division; an application was then made to this Court, and we held that the application was a step or proceeding in a cause or matter the result of which might be punishment of the defendant, which might so end, and was therefore a "criminal cause or matter" within the meaning of the Act. We there decided that we did not confine the words of sect. 47, excluding our jurisdiction, to proceedings the actual final result of which would be the infliction of a penalty, and said that we would not entertain any appeal in reference to any dispute which at any time, and at any stage, might end in a penalty. We said, therefore, that we could not interfere when the magistrate refused to state a case in such a dispute. Here a case has been stated, and the point to be decided upon that case was one in regard to a proceeding which might ultimately result in the infliction of a penalty. It seems to me to be clearly within the decision in *Reg. v. Schofield* (*ubi sup.*), where I quoted and adopted the words, "I think that the clause of sect. 47 in question applies to a decision by way of judicial determination of any question raised in or with regard to proceedings the subject-matter of which is

criminal, at whatever stage of the proceedings the question arises." There cannot be a doubt but that, if this matter had to be taken before the justices, under Jervis's Act (11 & 12 Vict. c. 43), so as to enforce the order by inflicting a penalty, it would then be a "criminal cause or matter;" it has been so held over and over again. This proceeding, therefore, is a step in a criminal cause or matter as to which we have no appellate jurisdiction. The decision in *Reg. v. Schofield* (*ubi sup.*) has not contradicted any other case. It is the last decision on the subject, following after *Reg. v. Woodall* (*ubi sup.*), and shows what is the final determination of this court as to the meaning of sect. 47 of the Judicature Act, 1873. We have no jurisdiction to hear this appeal, which must be dismissed.

Fry, L.J.—In answer to the preliminary objection taken to this appeal, Mr. Cutler has raised two points. He says that this is not a "criminal cause or matter, and that it is an appeal "for some error of law apparent upon the record," and therefore not within the provision excluding our jurisdiction. This question has been decided by *Reg. v. Schofield* (*ubi sup.*), that a proceeding like this is a "criminal cause or matter;" it is a step in a proceeding which leads in the end to a punitive remedy, which is the ultimate object of the proceedings. The case of *Reg. v. Schofield* (*ubi sup.*) is quite consistent with the case of *Loughborough Highway Board v. Ourzon* (*ubi sup.*) and the other cases which have been cited. Then it is said that this is an "error of law apparent upon the record." There is here no "record" within the meaning of sect. 47; that section is a reservation of the former right of appeal on a point of law apparent upon the record in a criminal trial, when no case is reserved for the Court for Crown Cases Reserved; that proviso is not applicable to proceedings before a magistrate such as these. I am clearly of opinion that there is no "record" in this case within the meaning of sect. 47.

Lord ESHER, M.R.—I wish to add that I quite agree as to the second point. The last part of sect. 47 was only intended to apply to appeals which, under the old system, before the Judicature Acts, went to the Court of Exchequer Chamber.

Appeal dismissed.

Solicitor for Wright, *W. Doveton Smyth.*

Solicitor for Payne, *W. A. Blaaland.*

PAYNE
v.
WRIGHT.

1892.

Practice—
Appeal—
Jurisdiction
—Criminal
cause or
matter—
Order of
magistrate
under Metro-
politan Build-
ing Act, 1855,
s. 19—Judi-
cature Act,
1873, s. 47.

QUEEN'S BENCH DIVISION

Thursday, Nov. 19, 1891.

(Before MATHEW and SMITH, JJ.)

Ex parte PULBROOK. (a)

Practice—Appeal—Libel published in newspaper—Order giving leave to commence criminal prosecution—Criminal proceedings—Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 8—Supreme Court of Judicature Act 1873 (36 & 37 Vict. c. 66), s. 50—Rules of Supreme Court, 1883, Order LXVIII., r. 1.

An order having been obtained from a judge in chambers giving leave to commence a criminal prosecution for libel under sect. 8 of the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), the defendant appealed.

Held, that no appeal lies from such an order, as it is an order made in a criminal proceeding.

A PPEAL from Chambers.

This was an appeal from an order made by Jeune, J., at chambers, that Anthony Pulbrook be at liberty to commence a criminal prosecution against C. W. Perryman pursuant to the Law of Libel Amendment Act, 1888, s. 8, for certain libels contained in various numbers of a certain newspaper called the *Financial Observer and Mining Herald*.

From this order Perryman appealed. A preliminary objection was raised on behalf of Pulbrook that no appeal would lie, as this was an order made in a criminal proceeding.

Sect. 8 of the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), is as follows:

Section three of the forty-fourth and forty-fifth Victoria, chapter sixty, is hereby repealed, and instead thereof be it enacted that no criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper, for any libel published therein, without the order of a judge at chambers being first had and obtained. Such application shall be made on notice to the person accused, who shall have an opportunity of being heard against such application.

Sect. 50 of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), provides that,

Every order made by a judge of the said High Court in chambers, except orders made in the exercise of such discretion as aforesaid, may be set aside or discharged upon notice by any divisional court, or by the judge sitting in court according to the course and practice of the division of the High Court to which the particular

(a) Reported by ALFRED H. LEFROY, Esq., Barrister-at-Law.

cause or matter in which such order is made may be assigned; and no appeal shall lie from any such order, to set aside or discharge which no such motion has been made, unless by special leave of the judge by whom such order was made, or of the Court of appeal.

And Order LXVIII., r. 1, of the Rules of the Supreme Court, 1883, says that,

Subject to the provisions of this order, nothing in these rules, save as expressly provided, shall affect the procedure or practice . . . in criminal proceedings.

Cock, Q.C. (*Forrest Fulton* and *R. D. Muir* with him) appeared for the appellant.—This proceeding is not a criminal proceeding in itself, though no doubt it will become such if the order that was made in chambers is upheld. The application to the judge at chambers is a civil proceeding, and is only a preliminary step necessary to ascertain whether the parties have a right to institute criminal proceedings. [SMITH, J. referred to *Reg. v. Yates*, 15 Cox C. C. 272; 14 Q. B. Div. 648; 52 L. J. 778, Q. B.] Sect. 47 of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), has nothing to do with orders in chambers, and therefore does not apply here, and consequently the decisions as to the meaning of the words "criminal cause or matter" in that section are not in point. This is not a "cause" or "action" within the meaning of the interpretation section of that Act (sect. 100), but is a "matter" which by that section is to include "every proceeding in the court not in a cause;" and sect. 50 of the same Act expressly gives the right to set aside or discharge the judge's order. This is not a case in which the proceedings are criminal proceedings from the commencement.

Grain appeared for the respondent.—No appeal lies here, for this is a criminal proceeding and comes within sect. 47 of the Judicature Act of 1873. An order made under sect. 8 of the Law of Libel Amendment Act, 1883, is a preliminary step in a criminal matter. Under the Act of 1881, relating to criminal libels, the fiat of the Attorney-General or the Public Prosecutor was necessary. But the Act of 1883 has altered the tribunal, and allows the person who is accused to be heard. Therefore the procedure now is to issue a summons; affidavits are filed, and the parties go before the judge, who has to satisfy his mind, before he can make an order, that a *prima facie* case has been made out that a criminal act has been committed; therefore this is a step in a criminal proceeding, and clearly comes within sect. 47 of the Judicature Act of 1873. [SMITH, J.—If a judge allows bail, will an appeal lie from his order?] The cases showing what are criminal matters are collected in Short & Mellors' Crown Practice, at pp. 510, 511, and 512, and clearly indicate that no appeal lies in this case. Sect. 8 of the Law of Libel Amendment Act, 1883, provides that the application for the order shall be made "on notice to the person accused." The very fact that the Legislature makes use of the words "person accused" indicates that the proceeding is a criminal proceeding: (*Reg. v. Rudge*, 53 L. T. Rep. N. S. 851; 16 Q. B. Div. 459; *Reg. v.*

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PULBROOK.

1891.

Practice—
Appeal—
Criminal pro-
ceedings—
Order giving
leave to prose-
cute for news-
paper libel—
51 & 52 Vict.
c. 64, s. 8—
36 & 37 Vict.
c. 66, s. 50—
Order
LXVIII., r. 1.

Ex parte *Justices of Central Criminal Court* (16 Cox C. C. 196 ; 56 L. T. Rep. N. S. 352 ; 18 Q. B. Div. 314.)

1891. *Cock*, Q.C. replied.

Practice— MATHEW, J.—This appeal must be dismissed, because the preliminary point must be decided against the appellant. The
Appeal— question arises under sect. 8 of the Law of Libel Amendment
Criminal proceedings— Act, 1888 (51 & 52 Vict. c. 64), which repeals 44 & 45 Vict. c. 60,
Order giving s. 3, and enacts "that no criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person
leave to prosecute for newspaper libel— responsible for the publication of a newspaper, for any libel
51 & 52 Vict. published therein, without the order of a judge at chambers first
c. 64, s. 8— had and obtained. Such application shall be made on notice to
36 & 37 Vict. the person accused, who shall have an opportunity of being heard
c. 66, s. 50— against such application." Mr. Cock relies on the use of the
Order word "order" in this section, and refers to sect. 50 of the
LXVIII., r. 1. Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), the effect of which, he contends, is that the order now before us may be set aside or discharged upon notice by this Court. Now, before the Judicature Acts came into operation, there were no means of reviewing the decision of a judge at chambers in a criminal matter, but sect. 50 of the Act of 1873 provides for the setting aside of a judge's order, "according to the course and practice of the Division of the High Court to which the particular cause or matter in which such order is made may be assigned." Then, by the Rules of the Supreme Court, 1883, Order LXVIII., r. 1, "criminal proceedings" are excluded from the operation of the rules made under the Judicature Acts. The question, therefore, arises whether this order is a criminal proceeding. With regard to this point, there are three decisions of the Court of Appeal, which turn upon the question as to what is a "criminal cause or matter" within the meaning of sect. 47 of the Supreme Court of Judicature Act, 1873. The cases are: *Reg. v. Steel*, 35 L. T. Rep. N. S. 534 ; 2 Q. B. Div. 37 ; *Ex parte Woodhall*, 59 L. T. Rep. N. S. 841 ; 20 Q. B. Div. 832 ; and *Ex parte Schofield*, 17 Cox C. C. 308 ; 64 L. T. Rep. N. S. 780 ; (1891) 2 Q. B. 428. In the last-mentioned case, the Queen's Bench Division having refused to grant an order *nisi* for a *mandamus* to compel a stipendiary magistrate who had made an order, under sect. 96 of the Public Health Act, 1875, for the abatement of a nuisance, to state a case for the opinion of the Court, the applicant moved *ex parte*, by way of appeal from the Queen's Bench Division, for an order *nisi* in the Court of Appeal ; and it was held that the decision of the Queen's Bench Division was given in a "criminal cause or matter" within the meaning of sect. 47 of the Judicature Act, 1873, and therefore that the Court of Appeal had no jurisdiction to entertain the application for a *mandamus*. It is not necessary to read the whole of the judgments delivered, but there is one passage in the judgment of Lord Esher, M.R. which has an important bearing upon the question now before the Court. He said : "In *Ex parte Woodhall* (20 Q. B. Div. 37) the Court

of Appeal advisedly dealt with this question of jurisdiction generally. In my judgment I say, 'We consider that we ought not any longer to flinch from determining whether we have or have not jurisdiction to hear an appeal in such a case as this, and we desire to rest our decision, not upon the facts of the particular case, but upon the determination of the question of jurisdiction.' The court therefore deliberately undertook to decide when there was, and when there was not, jurisdiction in such cases, and the judgment proceeds: 'The result of all the decided cases is to show that the words "criminal cause or matter" in sect. 47 should receive the widest possible interpretation. The intention was that no appeal should lie in any "criminal matter" in the widest sense of the term, this Court being constituted for the hearing of appeals in civil causes or matters;' and at p. 836 of 20 Q. B. Div.: 'In the present case I think I must try to express my meaning in other words,' i.e., other than had been used in previous cases. "I think that the clause of sect. 47 in question applies to a decision by way of judicial determination of any question raised in or with regard to proceedings, the subject-matter of which is criminal, at whatever stage of the proceedings the question arises:" (1891) Q. B. at pp. 430, 431.) Mr. Cock argues that in the present case the order is not a criminal proceeding, because it is a preliminary step, and criminal proceedings cannot be commenced until the order of a judge at chambers has been obtained; but that argument is met by the decision of the Court of Appeal in *Ex parte Woodhall* (20 Q. B. Div. 832). For these reasons I am of opinion that no appeal lies.

SMITH, J.—I am of the same opinion. This is an appeal from the order of Jeune, J., allowing a prosecution for libels alleged to have been published in a newspaper. Before 1888 proprietors, publishers, and editors of newspapers were protected by sect. 3 of the Act of 1881 (44 & 45 Vict. c. 60), which made the fiat of the Director of Public Prosecutions a condition precedent to a prosecution for libel. No one could doubt that while that section was in force, if the fiat was granted, no appeal would lie. That section was repealed by sect. 8 of the Act of 1888 (51 & 52 Vict. c. 64), which enacts that the order of a judge at chambers must be obtained. It is true, as was pointed out by Mr. Cock, that in the section now in force the word used is "order," not "fiat," as in the earlier enactment, and it is urged that this is an "order" from which an appeal is given by sect. 50 of the Supreme Court of Judicature Act, 1873. The first question which we have to decide is whether the order of Jeune, J. was made in a criminal proceeding, and with regard to this question it is important to observe that the Act of 1888 provides that the application is to be made "on notice to the person accused;" the expression is not even "the defendant." I agree with Mr. Cock that sect. 47 of the Supreme Court of Judicature Act, 1873, does not apply to appeals from chambers, but the decisions

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1891.

Practice—
Appeal—
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ceedings—
Order giving
leave to prose-
cute for news-
paper libel—
51 & 52 Vict.
c. 64, s. 8—
38 & 37 Vict.
c. 66, s. 50—
Order
LXVIII., r. 1.

Ex parte
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1891.

Practice—
Appeal—

Criminal pro-
ceedings—

Order giving
leave to prose-
cute for news-
paper libel—

51 & 52 Vict.
c. 64, s. 8—
36 & 37 Vict.
s. 66, s. 50—

Order

LXVIII., r. 1.

on that section are important with regard to the question whether this is a criminal proceeding. [The learned Judge read the passage from the judgment in *Ex parte Schofield* set out in the preceding judgment.] It is contended that this is not a criminal proceeding because there can be no prosecution until after an order has been obtained. I do not agree with this contention, for when the application is made I think a step is taken in a criminal proceeding. Sect. 50 of the Supreme Court of Judicature Act, 1873, is the only provision which could possibly give us jurisdiction to entertain this appeal, but I do not agree that it does so. Before the Judicature Rules were made there was no appeal from the decision of a judge in a criminal case. The only cases in which a decision could be reviewed were where there was error on the record, or where a case was stated for the Court for Crown Cases Reserved. Assuming this to be a criminal proceeding I cannot see how it can be held that sect. 50 of the Supreme Court of Judicature Act, 1873, gives an appeal, for that section provides for setting aside or discharging orders "according to the course and practice of the division of the High Court to which the particular cause or matter in which such order is made may be assigned." These words are inapplicable to criminal proceedings, and must have been intended to apply to civil proceedings, in which there was a "course and practice" with regard to setting aside and discharging orders, not to criminal proceedings, in which no such "course and practice" existed. I am of opinion that, having regard to the provisions of sect. 50 of the Supreme Court of Judicature Act, 1873, and the Rules of the Supreme Court, 1883, Order LXVIII., this is an appeal in a criminal proceeding, which the court has no jurisdiction to entertain.

Appeal dismissed.

Solicitors for the appellant, *Vernon and Sons.*

Solicitors for the respondent, *Wontner and Sons.*

QUEEN'S BENCH DIVISION.

Wednesday, Dec. 9, 1891.

(Before Lord COLERIDGE, C.J. and SMITH, J.)

BANTON v. DAVIES. (a)

Justices — Jurisdiction — Breach of law — Refusal of justices to convict — Driving stage coach without a licence — Application by employer of driver for licence — Personal application of driver required by licensing committee — Refusal of licence where application made in absence of driver — Validity of committee's requirement — Llandudno Improvement Act, 1854 — Town Police Causes Act, 1847 (10 & 11 Vict. c. 89), s. 47.

An information was laid by an inspector against the defendant for unlawfully driving a stage coach without having obtained a licence from the Improvement Commissioners of Llandudno. Defendant was in the employ of a carriage proprietor as a stage coach driver. The licensing committee appointed by the commissioners passed a resolution requiring drivers who desired their licences renewed to apply to the committee in person. The manager of the said carriage proprietor applied to the licensing committee for a renewal of, amongst others, the defendant's licence. The committee refused to consider any application unless the applicants attended personally. No complaint was made against the defendant personally. The defendant subsequently acted as a driver without a licence. The justices held that the defendant had failed to obtain a licence in consequence of the committee refusing to hear his application, although they had no complaint against him, and that under those circumstances the charge was trivial, and they accordingly dismissed it. The inspector who preferred the charge appealed :

Held, that the justices were wrong and should have convicted, for there had been a breach of the law, and that the commissioners had a right to insist on the personal attendance of the applicants, the possession of a driver's licence being a personal privilege. Case remitted.

THIS was a case stated for the opinion of the Court by the justices in and for the county of Carnarvon, on the application of John Banton, the informant, who appealed from an order made by the said justices upon a certain information preferred by him. The facts of this case, which was brought before the Court as a test case, are fully set out in the case stated, and, so far as is material, are as follows :—

2. At a petty session holden at Llandudno, in the county of

(a) Reported by ALFRED H. LEFROY, Esq., Barrister-at-Law.

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Jurisdiction
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convict—
Stage coach
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Licence re-
fused because
application
not attended
by driver per-
sonally—
Validity of
requirement
as to personal
attendance—
10 & 11 Vict.
c. 89, s. 47.*

Carnarvon, in and for the division of Conway in the said county on the 1st day of August, 1891, before us the undersigned, being four of Her Majesty's justices of the peace for the said county in the division aforesaid, a certain information was preferred by the said John Banton (hereinafter called the appellant), an inspector appointed by the Llandudno Improvement Commissioners, being the local sanitary authority, against the said John Davies (hereinafter called the respondent), charging that the said respondent on the 7th day of July then instant, in the town of Llandudno, in the said county, did unlawfully drive a certain stage coach there within the limits of the Llandudno Improvement Acts 1854 and 1876, to wit, in Church Walks, without a licence duly obtained by him for that purpose from the Llandudno Improvement Commissioners, contrary to the statute in that case made and provided. The appellant and respondent both being present or represented by their solicitors, the said charge and the evidence both in support of and against the same was duly heard by us, and upon such hearing we dismissed the said charge.

4. On behalf of the appellant it was proved in evidence that the said respondent did act as the driver of a stage coach without having any licence so to act.

On behalf of the respondent the following facts were proved in evidence :

(A.) That the respondent, together with a number of other persons, was in the employ of one Charles Albert Hartley, coach and carriage proprietor, of Llandudno, as a stage coach driver.

(B.) That a committee of the said Llandudno Improvement Commissioners sat on Monday, the 9th day of June, to hear applications for licences as stage coach and hackney carriage drivers.

(C.) That on the 27th day of June the manager for the said C. A. Hartley, on behalf of the respondent and other drivers in his employ, called upon the clerk to the said Improvement Commissioners with a view of arranging that on the following Monday he, the said manager, should attend before the said licensing committee on behalf of the respondent and the said other drivers, and make application on their behalf for renewed licences, on the understanding that if the licensing committee desired the attendance of any particular driver against whom a conviction might have been obtained during the previous year, such driver should subsequently attend in person before the committee. The clerk, without undertaking to bind the said committee personally, considered that the course proposed was a reasonable one, and would avoid inconvenience and trouble.

(D.) That pecuniary loss had been sustained in previous years from every driver, including the respondent, being required to attend at a very busy part of the season before the licensing committee of the said Improvement Commissioners, with the result that some of them were detained there the greater part of the day.

(E.) That on Monday, the 29th day of June, the manager for the said C. A. Hartley accordingly attended before the licensing committee on behalf of the respondent and the said other drivers, and made a written application for the renewal of his and their licences, and tendered the fees payable in respect thereof; but the said manager was thereupon informed by the committee that they would not consider any application unless the applicant attended in person before them, and the said committee accordingly did not consider the applications of the respondent and the said other drivers or grant them any licences.

(F.) Previous to the manager of the said C. A. Hartley appearing before the said committee on the 29th day of June the committee on the same day, as appeared by the minutes of their meeting, had passed the following resolution: "Resolved, that every driver be required to make a personal application for his licence." No other resolution with reference to such personal application had been passed by either the said Improvement Commissioners or the said committee.

(G.) That certain correspondence then took place between the said C. A. Hartley (on behalf of the respondent and his said other drivers), and the said Improvement Commissioners, in which it was stated by the commissioners that their object in requiring the personal attendance of every driver was in order that they might have an opportunity of "reprimanding or cautioning any driver against whom a complaint had been made," to which the said C. A. Hartley replied, "As I before mentioned I should send new men up to make their own applications, also, if there was anyone you wished to reprimand, on the inspector mentioning it that individual man should be sent up personally;" but he objected to personal attendance on the part of every driver on application for a renewed licence being insisted upon as an unreasonable requirement.

(H.) That the respondent has been granted a licence as a stage coach or hackney carriage driver each year for about seven years in succession, during which time he has never been convicted of any breach of the bye-laws of the said commissioners, or of any offence as such driver, and it was not suggested by the said commissioners that any complaint was made or was to be made against him.

(I.) That the committee of the said Improvement Commissioners which sat on the 29th day of June was the committee known as the bye-laws committee, and had not been appointed by the said commissioners to consider, and grant, or refuse, and had not had delegated to it the duty of considering and of granting or refusing applications for drivers' licences, and that such committee had been convened by the clerk to adjudicate on applications for such licences because he considered that the granting or refusing of drivers' licences came within the duties of the bye-laws committee, which were "to deal with all questions arising on the bye-laws of the said commissioners." The minutes of the committee which

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fused because
application
not attended
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sonally—
Validity of
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*Justices—
Jurisdiction
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Stage coach
driver—
Driving with-
out licence—
Licence re-
fused because
application
not attended
by driver
personally—
Validity of
requirement
as to personal
attendance—
10 & 11 Vict.
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sat on the 29th day of June as aforesaid were, however, subsequently adopted at a board meeting of the said commissioners.

(J.) It was admitted that for a great number of years it has been the practice of the said commissioners to require the personal attendance of drivers applying for a renewed licence.

(K.) The respondent contended (1) that under the circumstances stated in paragraph (I.) hereof, the said bye-laws committee had no power to grant or refuse the said licences, and that the commissioners had provided no other means of granting such licences; and (2) that if the said committee had such power, they had no right under the circumstances hereinbefore appearing to refuse to consider and adjudicate on the application of the respondent for a licence because he did not personally attend to make the application.

(L.) No objection was made to the circumstances under which the respondent came to be without a licence, and the reasons why the said Improvement Commissioners had refused to consider his application for a licence being given in evidence.

(M.) We being of opinion that the subsequent adoption by the said Improvement Commissioners of the minutes of the bye laws committee cured any defect in their power to consider applications for drivers' licences, decided the first point raised by the respondent against him, and as to the second point raised by the respondent we held as a fact that the respondent had failed to obtain a licence in consequence of the committee refusing to hear his application while they had no complaint against him, and that under these circumstances, the charge was trivial and ought to be dismissed, and we dismissed the same accordingly, but the appellant questioned the proceedings on the following grounds, namely: (1) that the determination dismissing the said complaint was erroneous in point of law, inasmuch as we, the said justices, had no jurisdiction to inquire into the reasons why the Llandudno Improvement Commissioners did not license the respondent as a driver of a stage coach; and (2) that if we had such jurisdiction, the reason why the said commissioners did not license the respondent was a lawful and a proper reason.

The question for the court was whether the said justices were correct in point of law in their determination as aforesaid.

The statutes applicable to this case are the Llandudno Improvement Act, 1854; the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), under sect. 47 of which Act the information was laid, and the Local Government Boards Provisional Order Confirmation (Acton, &c.) Act, 1881 (44 & 45 Vict. c. clxii.), the portion of which Act relating to the district of the Llandudno Improvement Commissioners, by articles 3 and 4, confers power on the said Llandudno Improvement Commissioners to license stage coaches within their district, and makes the term "hackney carriage" whenever used in sects. 37, 39 to 52, 54, 58, and 60 to 68 of the Town Police Clauses Act, 1847, as

incorporated with the said Llandudno Improvement Act, 1854, to include "stage coaches."

E. H. Lloyd appeared for the appellant.

F. Marshall for the respondent.

LORD COLERIDGE, C.J.—I am clearly of opinion that the Llandudno Improvement Commissioners have a perfect right to compel the stage coach drivers, who require licences to drive, to come before them and make their applications in person. We are told that this case has been brought before us as a test case and therefore it ceases to be a trivial case, and becomes one of some importance. The respondent here refuses to make his application for a licence in person, and a number of persons resolve to do likewise, and they bind themselves together to defy the law. In fact it is clear the law has been broken. The licensing committee did not refuse to hear the applications for licences, but they insisted that the applicants should come before them in person to make the applications. Had they a right to so insist? I think they undoubtedly had. The driver Davies did not come before them, and in this, no doubt, he acted in concert with others, in order to test the licensing committee in carrying out their resolution. In addition to this, the respondent has acted as driver of a stage coach without having any licence so to act. He has therefore been guilty of a breach of the laws, and an offence having been committed the justices should have convicted. It is not correct to say that the respondent failed to obtain a licence in consequence of the committee refusing to hear his application. They did not so refuse; all they said was "You must come before us and make your application in person, otherwise we cannot grant you a licence." This they are entitled to do. The respondent failed to make such personal application, and therefore did not obtain a licence. He acted as a driver without a licence, and thereby broke the law. I am clearly of opinion he ought to have been convicted, and that the justices ought not to have dismissed the charge as being a trivial one. The case must be remitted to them to convict, but we leave it to the discretion of the justices as to what fine they should under the circumstances inflict upon the respondent.

SMITH, J.—I am entirely of the same opinion. The obtaining a driver's licence is a personal privilege, and the men must themselves attend before the licensing committee, and make their applications in person.

Appeal allowed.

Solicitors for the appellant, *Belfrage and Co.*, agents for *Chamberlaine and Johnson*, Llandudno.

Solicitors for the respondent, *Marshall and Co.*, for *Pugh and Bone*, Llandudno.

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Justices—
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Validity of
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QUEEN'S BENCH DIVISION.

Monday, Feb. 15, 1892.

(Before HAWKINS and WILLS, JJ.)

ROGERS v. RICHARDS. (a)

Practice—Information—Summons—Two offences charged in one summons—Defect only in substance—Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), ss. 1, 10—Prevention of Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 42, ss. 3, 14).

The defendants were charged upon one information and in one summons under the Prevention of Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 42), s. 3, with unlawfully using a place for the purpose of fighting two dogs, and with encouraging, aiding, and assisting at the fighting of such dogs.

It is provided by the Summary Jurisdiction Act, 1848, s. 1, that no objection shall be taken to any summons for an alleged defect in substance or in form; and by sect. 10 that every complaint shall be for one matter of complaint only, and not for two or more matters of complaint, and every information shall be for one offence only, and not for two or more offences.

The objection was taken on behalf of the defendants that the summons was bad upon the ground that the complaint against them was for two matters of complaint.

Held, that the objection to the summons was for a defect in substance only, and must be overruled.

THIS was a case stated for the opinion of the court by the stipendiary magistrate for the Wolverhampton and South Staffordshire District, and was in the following terms:

1. The defendants were on the 20th day of October, 1891, charged before me, sitting as a Court of summary jurisdiction at Wednesbury, on the prosecution of the inspector of the Royal Society for the Prevention of Cruelty to Animals, for that they did, "on the 4th day of September, 1891, at Darlaston, in the county aforesaid, unlawfully use a place, to wit, a room, at The Old George Inn, at Darlaston, for the purpose of fighting two dogs, and did encourage, aid, and assist at the fighting of such dogs."

2. Objection was taken on behalf of the defendants at the commencement of the hearing that the information disclosed two offences, the first being under the first portion of sect. 3 of

(a) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

the Prevention of Cruelty to Animals Act (12 & 13 Vict. c. 92), and the second offence under the latter part of the same section, and that I had no power then to amend the summons, as by sect. 14 every complaint must be made within one calendar month after the cause of complaint had arisen.

3. I was of opinion that the offences charged were separate offences under sect. 3, inasmuch as separate penalties were imposed for "using" a room, and "encouraging, aiding, &c.," at the fight, and that the information and summons were bad. I also refused to amend the information and summons, as that would practically be granting a new summons after the expiration of the limit imposed by sect. 4.

4. The prosecutor being dissatisfied with my determination, as being erroneous in point of law, duly applied to me in writing, on the 27th day of October, 1891, to state a case in writing for the opinion of this Honourable Court, and he further has, this day, entered into his recognisance to duly prosecute the appeal, pursuant to the Summary Jurisdiction Act, 1879.

5. The question for this honourable court is whether my decision as stated in paragraph 3 of this case is correct in law.

The Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), enacts

Sect. 1. . . . provided also, that no objection shall be taken or allowed to any information, complaint, or summons for any alleged defect therein in substance or in form, or for any variance between such information, complaint, or summons, and the evidence adduced on the part of the informant or complainant at the hearing of such information or complaint as hereinafter mentioned; but if any such variance shall appear to the justice or justices present and acting at such hearing to be such that the party so summoned and appearing has been thereby deceived or misled, it shall be lawful for such justice or justices, upon such terms as he or they shall think fit, to adjourn the hearing of the case to some future day.

Sect. 10. . . . and every such complaint shall be for one matter of complaint only, and not for two or more matters of complaint; and every such information shall be for one offence only and not for two or more offences.

The Prevention of Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92) provides as follows:

Sect. 8. That every person who shall keep or use or act in the management of any place for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature, or shall permit or suffer any place to be so used, shall be liable to a penalty . . . and every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, bear, badger, cock, or other animal as aforesaid shall forfeit and pay a penalty not exceeding five pounds for every such offence.

Sect. 14. That every complaint under the provisions of this Act shall be made within one calendar month after the cause of such complaint shall arise.

Colam for the prosecutor.—It is submitted that the magistrate was wrong in holding that the summons and information were bad. The objection of the defendants only alleged a defect in substance, and ought under sect. 1 of 11 & 12 Vict. c. 43, not to have been allowed. The case might have been adjourned, or the magistrate might have called upon the prosecution to elect which of the offences they would charge the defendants with. It was held in *Bartholomew v. Wiseman*

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Summons—
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summons—
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(heard on the 9th day of December, 1891, and not reported) that an information, which charged two persons, one with causing and the other with committing cruelty, was good.

The defendants did not appear.

HAWKINS, J.—I am of opinion that this case must go back to the magistrate, who should not have dismissed the complaint laid before him. The magistrate dismissed the case, upholding the objection which was raised on behalf of the defendants that the information disclosed two offences, and that he had no power to amend the summons, because every complaint under the Prevention of Cruelty to Animals Act, 1849, s. 3, must be made within one calendar month after the cause of complaint has arisen. Now, in my opinion, the case comes within the provision of sect. 10 of the Summary Jurisdiction Act, 1848, which enacts that every complaint shall be for one matter of complaint only and not for two or more matters of complaint, and every information shall be for one offence only and not for two or more offences, and the fact of there being two offences charged in the information would make it bad if there were no further provision dealing with such a case. But sect. 1 of the same Act provides: [Reads it.] I should say that the objection taken to this information was an objection to an information for an alleged defect therein in substance within the meaning of the section, and the magistrate if he had thought fit, could have adjourned the hearing of the case to some future day in order to give the defendants an opportunity of preparing their defence. But, it further seems to me to be good sense that, if a person is summoned for committing two offences, and takes objection to being tried for the two offences at the same time, the justices can remedy the defect by trying him for one offence and not taking any notice of the second charge against him. Our attention has been called to the case of *Bartholomew v. Wiseman* (not reported), in which it was held that an information was good which charged two different persons with separate offences, namely, one with causing cruelty to an animal, and the other with committing the cruelty. That decision certainly confirms the opinion which I hold that the magistrate was wrong in the present instance, and the case must be remitted back to him with this expression of our opinion.

WILLS, J.—I am of the same opinion. The scheme of the Summary Jurisdiction Act, 1848, is quite plain. A summons is not to be got rid of merely because there is some mistake in substance or in form, but the justices are, if they think it necessary, to adjourn the case. But, on the other hand, if there is a substantial alteration in the charge the information may then be dismissed. The case must go back to the magistrate for him to deal with it upon its merits.

Case remitted.

Solicitor for the prosecutor, *A. Leslie.*

QUEEN'S BENCH DIVISION.

Monday, Feb. 15, 1892.

(Before HAWKINS and WILLS, JJ.)

THE ROYAL COLLEGE OF VETERINARY SURGEONS v. ROBINSON. (a)

*Misrepresentation—Veterinary surgeon—Qualification—“Veterinary forge”—Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), s. 17.**The Veterinary Surgeons Act, 1881, provides that any unqualified person who takes or uses the title of veterinary surgeon or veterinary practitioner, or any name, title, addition, or description stating that he is a veterinary surgeon or a practitioner of veterinary surgery, or of any branch thereof, or is especially qualified to practise the same, shall be liable to a fine.**The defendant, who was not a properly qualified veterinary surgeon, carried on the business of a shoeing smith, and had in a prominent place on his business premises and on his billheads the words, “J. Robinson, Veterinary Forge.”**Held, that the defendant had thereby contravened the above provision, as he had held himself out as specially qualified to practice veterinary surgery.*

THIS was a case stated by one of the stipendiary magistrates of the metropolis, sitting at the West London Police-court, under the Summary Jurisdiction Act 1879, and was in the following terms:—

1. On the 8th day of December, 1891, an information came on for hearing before me, of which the following is a copy :

In the Metropolitan Police-court, holden at Hammersmith, the 1st day of December, 1891.

The information of the Royal College of Veterinary Surgeons, of No. 10, Red Lion Square, in the County of Middlesex; and the deposition of Charles Davis, of 82, Essex-street, Strand, in the County of Middlesex, solicitor's clerk, who, upon oath, states that John Robinson, of 6A, King-street, High-street, Kensington, in the County of Middlesex, not being on the register of veterinary surgeons, and not holding at the time of the passing of the Veterinary Surgeons Act, 1881, the veterinary certificate of the Highland and Agricultural Society of Scotland, did on the 28th day of November, 1891, at 6A, King-street, High-street, Kensington, aforesaid, unlawfully use and take an addition and description stating that he was specially qualified to practice a branch of veterinary surgery contrary to sect. 17 of the aforesaid statute.

(a) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

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SURGEONS

v.

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*Misrepresentation—
“Veterinary
forge”—
Veterinary
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2. The said information was laid under sect. 17 of 44 & 45 Vict. c. 62, which is as follows :

Sect. 17 (1). If after the 31st day of December, 1888, any person other than a person who for the time being is on the register of veterinary surgeons, or who at the time of the passing of this Act held the veterinary certificate of the Highland and Agricultural Society of Scotland, takes or uses the title of veterinary surgeon or veterinary practitioner, or any name, title, addition or description stating that he is a veterinary surgeon or a practitioner of veterinary surgery, or of any branch thereof, or is specially qualified to practise the same, he shall be liable to a fine not exceeding twenty pounds.

(2). From and after the same day a person other than as in this section mentioned shall not be entitled to recover in any court any fee or charge for performing any veterinary operation, or for giving any veterinary attendance or advice, or for acting in any manner as a veterinary surgeon or veterinary practitioner, or for any practising in any case veterinary surgery or any branch thereof.

3. On behalf of the prosecution it was proved that the defendant John Robinson was not on the register of veterinary surgeons, and did not hold a veterinary certificate of the Highland and Agricultural Society of Scotland

4. That the defendant was a shoeing smith, and had for the last twenty-five years displayed in a prominent place on his business premises and on billheads the following words :
“ J. Robinson, veterinary forge, and at Shepherd’s Bush.”

5. The prosecution contended that the defendant thereby used a description stating that he was specially qualified to practise a branch of veterinary surgery.

6. It did not appear to me that the words “ veterinary forge ” constituted an addition or description stating that the defendant John Robinson was specially qualified to practice a branch of veterinary surgery within the meaning of the Act, and as the prosecution did not adduce evidence as to the meaning of the words “ veterinary forge,” I dismissed the information.

The prosecution have applied to me to state a case on the ground that my said decision was erroneous in point of law. The question for the opinion of the court is, does the use by the defendant of the words above set out constitute an offence against sect. 17 of the said Act ?

If it does the case is to be remitted to me to convict.

If not the dismissal is to stand. Given under my hand this 6th day of January, 1892, at the police-court aforesaid.

A. C. PLOWDEN.

Lumley Smith, Q.C. (with him *Colam*) for the prosecutors.—It is submitted that the magistrate was wrong, and should have convicted the defendant. By using the words “ veterinary forge ” the defendant has held himself out as specially qualified to practise veterinary surgery. Any person who saw these words put up would think that if he took his horse to be shod at the defendant’s yard that he would have the advantage of having his horse attended by a person who had some veterinary knowledge. The notice implies that this was more than an ordinary forge. It was to meet such cases as the present that this provision was inserted in the Act.

George Elliott for the defendant.—There is no right of appeal in this case, as there is no question of law to be decided, but only one of fact. It was so held in a case where a person was charged under the Medical Act (21 & 22 Vict. c. 90, s. 40), with contravening the provisions of that section by using the words “surgeon and mechanical dentist on his door plate: (*Ladd v. Gould*, 1 L. T. Rep. N. S. 325.) The prosecution in the present case called no person who had been misled by the notice put up by the defendant, although it has been up for twenty-five years. [WILLS, J.—It would be no offence prior to 1881 to have the notice board up.]

Lumley Smith in reply.—There is a mixed question of law and fact to be decided, and the right of appeal in such a case is clear. It is the same class of question as arose in *Reg. v. J. Bridge, Esq.* (17 Cox C. C. 66; 62 L. T. Rep. N. S. 297; 24 Q. B. Div. 609), where the point in dispute was, whether cinders were trade refuse within the meaning of the Metropolis Management Act, 1855. In another case under the Medical Act (21 & 22 Vict. c. 90), where a surgeon prefixed the title “Dr.” to his name on his door, the facts were all gone into on a case stated for the opinion of this court: (*Ellis v. Kelly*, 30 L. J. 35, M. C.)

HAWKINS, J.—I am of opinion that the magistrate ought to have convicted the defendant in this case. Now, the preamble to the Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), shows clearly what the object of the statute is, for it says, “whereas it is expedient that provision be made to enable persons requiring the aid of a veterinary surgeon for the cure or prevention of diseases in or injuries to horses and other animals to distinguish between qualified or unqualified practitioners.” Now, nothing in my opinion is so likely to cause pain and disease to a horse as improper shoeing. Then, as to the earlier provisions of the Act, I do not trouble myself, as they do not apply to this case until we reach sect. 16, which enacts that a person who, not being a fellow or member of the Royal College of Veterinary Surgeons, takes or uses any name or description by means of initials or letters placed after his name stating or implying that he is a member or fellow of the college, renders himself liable to a certain penalty. Then the next section, sect. 17, sub-sect. 1, runs thus: “If, after the 31st day of December, 1883, any person other than a person who for the time being is on the register of veterinary surgeons, or who at the time of the passing of this Act held the veterinary certificate of the Highland and Agricultural Society of Scotland, takes or uses the title of veterinary surgeon or veterinary practitioner, or any name, title, addition, or description stating that he is a veterinary surgeon or a practitioner of veterinary surgery, or of any branch thereof, or is specially qualified to practise the same, he shall be liable to a fine not exceeding twenty pounds.” Now, let us consider what the offence is with which the defendant is charged. It is that he, not being on the register of veterinary surgeons, and

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not holding at the time of the passing of the above-mentioned Act the veterinary certificate of the Highland and Agricultural Society of Scotland, did unlawfully use and take an addition and description stating that he was specially qualified to practise a branch of veterinary surgery. Now, this is what he actually did; he carried on a shoeing forge, and he displayed in a prominent place on his business premises the words, "J. Robinson, veterinary forge." It is quite true, that by doing this he does not say in so many words that he is skilled in veterinary science, but any person seeing this notice would naturally come to the conclusion that the person carrying on business was scientifically capable of doing the work which he held himself out to do. This seems to me to be the very kind of case that this Act was passed to prevent. The defendant no doubt was a skilled shoer, but still he had no veterinary knowledge. There is no question here of intention upon the part of the defendant to defraud anybody by the notice he put up, and the case which has been quoted to us would only have been in point if there had been some such intention. People must learn that they must not use terms which are likely to deceive the public. This being my opinion, the case must be remitted to the magistrate, with the intimation from us that he ought to have convicted the defendant.

WILLS, J.—I am of the same opinion. When the section speaks of a person, stating that he is specially qualified to practise veterinary surgery, it does not, in my opinion, mean that the person must state that he holds any diploma or certificate, but the word qualified is used in a more general sense. And I think that the expression used in this case, "veterinary forge," implies plainly that any person taking horses there would get the advantage of certain veterinary knowledge on the part of the person employed. I therefore also think that the defendant should have been convicted.

Case remitted.

Solicitor for the prosecutors, *G. Thatcher.*
Solicitor for the defendant, *J. Haynes.*

QUEEN'S BENCH DIVISION.

Saturday, Feb. 6.

(Before HAWKINS and WILLS, JJ.)

FILSHIE (appellant) v. EVINGTON (informant). (a)

Adulteration—Milk—Agreement to supply—Purchaser paying carriage from place of consignment—"Place of delivery" within sect. 3 of the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30).

Sect. 3 of the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30) provides that the inspector "may procure at the place of delivery any sample of milk in the course of delivery to the purchaser" for the purpose of making an analysis of the same. The appellant, a farmer, who had entered into an agreement to supply milk to a dairy company, to be "delivered at Hull," and the purchasers to pay the carriage, consigned two churns of milk from C. to the purchasers at Hull, where on its arrival at the station samples were taken by the respondent, and on analysis were found to be adulterated. The appellant was convicted and fined.

Held, that the conviction was right; that Hull was the place of delivery, and not C., although the purchasers had paid the carriage of the milk from the latter place.

CASE stated by the justices of the peace in and for the borough of Kingston-upon-Hull, who had convicted appellant of an offence under sect. 3 of the Sale of Food and Drugs Amendment Act, 1879 (42 & 43 Vict. c. 30).

The question raised was as to the interpretation of the words "place of delivery" in the above section as regards their application to an agreement which is in common use in contracts in the milk trade, viz., to supply milk, the purchaser paying for the carriage thereof from the place of consignment. The material facts set out in the stated case were as follows:—

On the 4th of May, 1891, an agreement in writing was made and entered into between the appellant of the one part and Lawrence Watson on behalf of the "Farmers and Cleveland Dairies Company Limited" (herein called the purchasers) of the other part, whereby the appellant agreed to supply the purchasers the whole of his dairy of good new milk of the best quality, with all its cream on, from the 1st May, 1891, to the 31st March, 1892.

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

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The second clause of the said agreement was as follows :

It is further agreed that the milk shall be delivered at London, or at such other station as the purchasers by any of their authorised officers or servants may from time to time appoint. Carriage to be paid by the purchasers.

It was admitted by the appellant that Hull was one of the stations to which the milk was appointed to be sent.

The appellant in pursuance of the said agreement consigned two churns of new milk from Castle Donnington Station to a Mr. George Henry Blake, the manager of the Company at Hull. and the purchasers paid the carriage of such milk from Castle Donnington to the various towns to which it was from time to time consigned at the request of the company, as provided by clause 2 of the said agreement. The respondent went to the Hull and Barnsley Railway Station, Cannon-street, Hull, and awaited the arrival of the train by which the milk was consigned. On the arrival of the train the said two churns of milk were taken from the van and placed by the railway officials on the platform. Immediately thereupon and before possession was taken by the company the respondent took a sample of milk from one of the churns and divided it into two parts. He sealed both parts, and marked them "No. 1," and handed one of such parts to James Baynes, public analyst for the said borough, for analysis, and the remaining sample he subsequently produced in court. It was further proved by a certificate of the said analyst that the sample of milk marked "No. 1," and handed to him by the respondent, was adulterated with at least six per cent. of added water.

The appellant was convicted and fined.

Heatall on behalf of the appellant.—The question here is, what is the meaning of "place of delivery?" It is submitted that the conviction was wrong in point of law, for on the facts of the case as proved and admitted before the justices the delivery of the milk by the appellant to the purchasers was completed at Castle Donnington, and not at Kingston-upon-Hull, for the milk was carried from the former station at the expense of the purchasers, and thus it was in effect delivered to them there, and therefore when the samples were taken at Hull the milk was no longer in course of delivery to the purchasers. Consequently the requirement of sect. 3 had not been complied with. The words of the statute are hard and fast, and one of the conditions precedent to a prosecution under this section is, that the milk must be obtained "in course of delivery," which had not been done here. Every antecedent step to a prosecution must exist before a prosecution can be properly commenced; here a most important step is wanting, consequently the justices had not jurisdiction to hear the case, and the conviction was wrong. The justices appear to have founded their judgment solely upon the word "delivery" in the agreement. [WILLS, J.—The agreement says the delivery is to be at Hull; why should we say it is to be anywhere else?]

Montague Lush, for the respondent was not called upon.

HAWKINS, J.—I am of opinion that the conviction by the

justices was right. The appellant and the purchasers agreed under the contract that the milk was to be delivered at Hull, and I have not the least doubt that that was the "place of delivery" within sect. 3 of the Act. It seems to me quite immaterial whether the purchasers paid for the carriage of the milk from the place of consignment or not. Whether they did so or not does not alter the fact that it was agreed by the parties to deliver the milk at Hull, and that the milk was in fact delivered there, Hull being the place where they had a place of business.

WILLS, J.—I am entirely of the same opinion.

Conviction affirmed.

Solicitors for the appellant, *F. Fitz-Payne*, agent for *Clifford and Perkins*, Loughborough.

Solicitors for the respondent, *Cunliffe and Davenport*, agents for *Town Clerk*, Hull.

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CROWN CASES RESERVED.

Saturday, Jan. 23.

(Before HAWKINS, WILLS, LAWRENCE, WRIGHT, and COLLINS, JJ.)

REG. v. CLARKSON AND OTHERS. (a)

Unlawful assembly—Assembly of persons for a lawful object—Commission of acts likely to lead to breach of the peace—Ignorance as to effect of so doing—Sufficiency of evidence to support conviction.

The marching of nine men, carrying with them musical instruments, upon a Sunday through the public streets of a town (in which town processions other than those of Her Majesty's naval, military, and volunteer forces are prohibited from taking place on Sunday, if accompanied by instrumental music) is no evidence of an unlawful assembly (although the so marching is calculated to and does excite others to the commission of a breach of the peace) if such men did not know that their acts were calculated to lead to a breach of the peace.

But, quære, whether where two or more persons are assembled together in pursuit of a common object, lawful in itself, and in the carrying out of such object do something which may lead to a breach of the peace (or which is calculated to lead others to

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

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believe that a breach of the peace will be committed), such assembly does not amount at common law to an unlawful assembly.

CASE stated by Hawkins, J. as follows :—

These nine defendants were tried before me at the November Sessions of the Central Criminal Court upon an indictment which had been found by the grand jury at the last Lewes Summer Assizes, and removed by order of the Court of Queen's Bench to the Central Criminal Court for trial.

The indictment contained six counts, the first, second, and third charging the defendants with conspiring to contravene the provisions of the Eastbourne Improvement Act, 1885. The remaining three counts charged the defendants with an unlawful assembly. On each count, except the fourth, the defendants were acquitted. On the fourth the jury found each of the defendants guilty.

I reserved the following case for the opinion of the Court for Crown Cases Reserved :—

By sect. 169 of the Eastbourne Improvements Act, 1885, it is in substance enacted that "No procession" (except of Her Majesty's naval, military, and volunteer forces) "shall take place in the borough of Eastbourne on a Sunday accompanied by instrumental music."

The defendants were charged in the fourth count of the indictment (upon which alone the question for the court is reserved) for that they "on the day aforesaid," being Sunday, in the borough aforesaid unlawfully did assemble and gather together armed and provided with drums, cornets, and horns, and other musical instruments to disturb the peace of our said Lady the Queen, and being so assembled and gathered together armed and provided with musical instruments as aforesaid, did then and there unlawfully make a great noise, tumult, and disturbance, and did then and there continue making such noise, tumults and disturbance for the space of an hour or more then next following, to the great disturbance and terror of liege subjects of our said Lady the Queen residing and being, and of all other the liege subjects of our said Lady the Queen then passing and repassing along the Queen's common highways there, in contempt of our said Lady the Queen and the laws to the evil example of all others in the like case offending, and against the peace of our said lady the Queen, her Crown, and dignity.

Mr. Willis, Q.C., for the defendants, after the defendants had pleaded "not guilty," asked me to quash the conviction upon the ground that it did not describe any offence amounting to an unlawful assembly. His chief objection being that the alleged acts of the defendants were not stated to have been "riotously or tumultuously done:" (cited 2 Chitty C. L. 488; Hawk. P. C., Book I., c. 65.)

I declined, however, to stop the case then, but reserved to myself liberty to submit the validity of the count to this Court in case of necessity.

I ask the Court, therefore, to pronounce its opinion whether the count is good or bad, confining the question merely to the points argued by Mr. Willis.

In support of the indictment the following evidence was given :

I can best send a copy of my notes, for I have no other minute of it, but if either party desires to use a shorthand note of the evidence, and the Court thinks fit to receive it, it may be made part of the case.

Copy notes of evidence :

John Fraser, Chief Constable of Eastbourne since 6th April in this year.—As fact 16th July Thursday.—Mr. Willis objects to evidence of what took place on Thursday.—Not pressed.—Sunday, 19th July.—There is a piece of waste ground in Latimer-road.—On the 19th July, shortly after 10 a.m., I went there.—I saw the local contingent of the Salvation Army, consisting of twenty-five persons, holding a service.—Large number of persons were there, number grew till 1200 to 1500 assembled; at last they made a shouting, a disturbing noise, hostile towards the Salvation Army.—Hymns, parodies on Salvation Army's, were sung by portion of crowd.—No physical interference.—I spoke to person conducting the service.—None of the defendants were there.—I saw defendants arrive in Latimer-road; they were strangers to me. I saw some were carrying musical instruments—drum and brass instruments.—I had there thirty men of police force, and three mounted men; they were at an end of street leading into Latimer-road. The waste land was private property, but open to the road.—Defendants were dressed in uniform.—The defendants joined the remainder, and the service was continued. Defendants then moved off together in an easterly direction.—Went down a side street leading to seaside.—Then I met them.—Marching three or four deep.—Shortly after I heard beat of a drum.—One or two beats, not to make a loud noise.—I heard a note or two on brass instruments.—I turned back and stopped them by standing in front.—Defendant Clarkson appeared to take the leading part.—I said they would not be allowed to play.—They proceeded along towards citadel, not attempting to play then.—We went in procession in front. I directly afterwards heard shouting in the rear.—I turned round and saw crowd had closed in on the Salvation band. Crowd was threatening.—I saw sticks raised in the air close to defendants; the sticks were raised by members of the crowd; by nobody else.—I believe the Salvation Army were then marching peaceably along with the mounted police. We cleared the crowd from the band, then I saw the instruments go to the lips of the band; they made no sound.—I told Clarkson I would not allow them to play.—He said, "We (or I) have played."—I then passed three or four of my men through their ranks, and endeavoured to disperse them.—The crowd appeared threatening, and I thought it better they should go along, and put the police on their flanks as a formal escort.—In that manner we proceeded as far as Pevensy or Langley-road.—In direction of the citadel, which is in Langley-road.—This time there was a large crowd.—I apprehended a breach of the peace.—Approaching citadel outside it was a larger crowd, through which the defendants had to pass to reach the citadel.—As we approached, the police were on each side of defendants.—At corner of Langley and Pevensy-road I saw defendants place instruments to their lips again, but they made no sound.—I heard a noise on drum, but not from defendants.—The crowd rushed on defendants, and I thought it was not safe for defendants to go through the crowd. I saw the Mayor there.—I had conversation with him, and then put police round the band, and told them I intended to take them to the Town Hall.—They were in custody.—I went to Town Hall with band, followed by the crowd.—Ten or fifteen minutes after came out again.—Crowd had dispersed, except thirty persons.—Mayor offered to liberate on condition they would not play.—They declined to give undertaking; they left instruments in my charge.—I heard some of the crowd insulting the Salvation Army.—I heard portion of crowd singing parodies of Salvation hymns.—Nothing in the twenty-five persons to cause alarm to anybody.—They were holding their ordinary service.—Crowd had sticks.—They did not play, that I know.—My memory does not enable me to say more.—The crowd increased.—The band went away alone down side street.—Clarkson, I think, had no instrument.—I had

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never seen either of them before.—Nothing in their conduct to terrify or alarm anybody.—I do not believe the defendants intended to assault or do mischief to a living soul.—Neither of them had a stick.—My men were close to them.—I anticipated the crowd would assault them.—I do not believe the defendants would have assaulted anyone.—No charge was made against any of the crowd.—I thought it likely the crowd would waylay the army.—I did not attempt to disperse the crowd.—If I had dispersed them there would have been a disturbance.—We had not sufficient men to protect the army.

Victorine Whitley, Lodning House, Royal Parade.—Procession of Salvation Army on Sunday, 19th.

Frederick Wm. Bathurst, wine merchant.—19th July on seaside.—Saw defendants marching.—I saw defendants do nothing at first.—I saw pushing of crowd.—The mounted police went to rear.—I heard two beats on a drum.—On turning round I noticed police surrounding defendants.—They proceeded to junction of Langley and Pevensey roads.—Mass of people at citadel.—I was afraid there would be trouble.—Previous disturbances.—Nothing there that led me to suppose there would be disturbances.

Harry Caldey, grocer's assistant.—Sunday, 19th July.—Saw band, saw attempt to play.—Tower-street, near seaside.—Chief constable spoke to leader of band—Good deal of excitement by shouting and hollering of crowd.—Second attempt near Ordnance-yard—Instruments up to mouths.—When crowd pushed I saw band strike with instruments and fists.—Several blows by bandmen.—Saw mounted police.—I was one of the crowd.—I apprehended breach of the peace.—I had a companion, Wood, with me.—I had a message from town clerk.—I cannot pick out one who used his fist.—I saw sticks in the air.—They were not then playing.—Several of them struck before being struck.—Men in uniform.

Frank Wood, grocer's assistant.—Saw army marching along seaside road.—When band began to play crowd hustled.—The band struck out at crowd.—I couldn't identify one who struck.—I only saw pushing.—I didn't actually see a blow.—I saw several struck.—I know men were before mayor.—I was not there.

This closed the case for the prosecution. Mr. Willis then submitted that there was no case.

With great hesitation I thought it better to leave the case to the jury, and I did so, directing them, so far as regarded the fourth count, in substance that in order to constitute an unlawful assembly it was essential that a breach of the peace should be involved, or that the public peace should be endangered as the probable result of such assembly carrying out or proceeding to carry out its object.

I read to them Hawk. P. C., Book I, c. 65, s. 9, as a definition of the law upon the subject. I also read to them, in further illustration of the law, the definition of the Criminal Code Commission in the draft code prepared in 1879, part IV., to this effect: "An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner, or so conduct themselves when assembled, as to cause persons in the neighbourhood of such assembly to fear on reasonable grounds that the persons so assembled will disturb the peace tumultuously, *or will by such assembly needlessly and without any reasonable occasion provoke other persons to disturb the peace tumultuously.*"

I ought to point out that in Sir James Stephens' History of the Criminal Law, vol. ii, p. 385 (note 1), referring to the words italicised, he expressly states that in using those words the Commissioners were declaring that which has not as yet been specifically decided in any particular case.

Beatty v. Gillbanks (47 L. T. Rep. N. S. 194; 15 Cox. C. C. 138; 9 Q. B. Div. 308) was also cited.

The jury found a verdict of guilty upon the fourth count.

If the fourth count is bad in law, or if there was misdirection on my part, or if I ought to have withdrawn the case from the jury, the conviction ought to be quashed, otherwise the defendants are to appear before me on a future day for sentence.

Willis, Q.C. (with him *Poland, Q.C.* and *Colam*).—It is submitted that the fourth count does not disclose any offence, inasmuch as it contains no allegation that this assembly was tumultuous, and it is not sufficient to allege that the assembly was unlawful: (*Reg. v. Vincent*, 9 C. & P. 91.) In order to constitute an unlawful assembly, an intention on the part of those assembled to commit a breach of the peace is necessary, and though such intention may be matter of inference, it is essential for the validity of the indictment that it should be clearly alleged. Some such word as "tumultuously" is necessary in order to show that the character of the assembly was such as to cause a breach of the peace. The widest definition of what constitutes an unlawful assembly is to be found in *Hawk. P. C.* 516, sect. 9; and it is submitted that there is no authority for the proposition that where persons are assembled together lawfully, such assembly becomes unlawful merely because other persons looking on think that the assembly may lead to a breach of the peace. [*HAWKINS, J.*—It was held in *Reg. v. Perkins* (4 C. & P. 537) that a number of persons assembled together to assist and countenance a prize fight was an unlawful assembly, and there the indictment did not conclude "in terrorem populi."] It is submitted that that was because the indictment was for riot, and the allegation that there was a riot was in itself an allegation of the peace having been disturbed. In *Beatty v. Gillbanks* (*ubi sup.*), *Field, J.* said: "But such an assembly must be tumultuous and against the peace." Here there was no evidence whatever that the defendants met tumultuously or with any intention of breaking the peace; the evidence, so far as they were concerned, showed the opposite, and there was nothing whatever in their conduct which was in any way calculated to strike terror into the hearts of others. *Beatty v. Gillbanks* is an authority that an assembly is not unlawful merely because it induces other persons to commit a breach of the peace. The only persons indicted here were the bandsmen, who, it was admitted, were ignorant of what had taken place upon previous occasions, and who were walking peaceably towards the citadel. [He was here stopped by the Court upon the question of want of evidence to support the conviction.]

Danckwertz (with him *C. F. Gill* and *E. Marshall Hall*).—It is submitted that there was some evidence of an intention on the part of the defendants to commit a breach of the peace, and it was for the jury to consider whether or not it was sufficient.

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The case showed that the defendants went down in the uniform of the Salvation Army, a well-known organised body, to a place where other members of that body were surrounded by a hostile crowd. Had they stopped there the jury might have found that nothing would have happened. The defendants proceeded, however, in formation along the streets, and attempted to play upon their instruments; or the jury might very well have drawn the conclusion that there had been an attempt made to play, for the chief constable saw some of them put their trumpets to their mouths upon two occasions. It is submitted that there was evidence from which the jury might have inferred that the bandsmen knew, through the action of the police in stopping them from playing, and the attitude of the crowd, that the playing through the streets was what the crowd objected to. The jury having found a verdict of guilty, it was to be assumed that they had drawn all inferences from the evidence which were necessary to support the verdict. Under the local Act it was unlawful to play musical instruments through the streets; there was evidence that the defendants knew it was their playing that the crowd objected to, and the jury were right in inferring that they had intended to play. If then the defendants were assembled to do that which they knew would cause the crowd to attack them, all the elements necessary to constitute an unlawful assembly were present. [WILLS, J.—The moment the defendants were told not to play they stopped attempting to do so.] It was only in deference to superior force that they abstained from playing. The present case was distinguishable from *Beatty v. Gilbanks*, because here the playing was in itself unlawful. The jury might very well have thought that there was no specific agreement between the defendants to commit a breach of the local Act, and nevertheless have thought that after the defendants left the piece of ground where they had been playing there was a common agreement to play, which if carried out would have been a breach of the Act, although there had been no specific intention to break it. If the effect of what the defendants did was to lead to a breach of the peace, the jury might very well infer that the defendants had intended to do that which had resulted in such breach. In vols. 1 and 2 of the State Trials there are a number of decisions which support the contention that the doing of a thing which is lawful, but which may lead to a breach of the peace, is an unlawful assembly.

HAWKINS, J.—We are unanimously of opinion that the conviction ought to be quashed. Without discussing the question, which we think it unnecessary to do, whether the indictment is good or bad, and without discussing what constitutes an unlawful assembly, but confining ourselves to the evidence in the case, we find that there was not any evidence upon which a reasonable jury could have acted in finding the defendants guilty of an unlawful assembly as they have done. Our reasons are, taking the whole of the material evidence, first of all that the nine

defendants, though members of the Salvation Army, were strangers to the borough of Eastbourne. They came down undoubtedly with their musical instruments in order to perform on Sunday, the 19th day of July, 1891. They found assembled at Eastbourne upon a piece of waste ground, which either they had hired or which they were permitted to use, twenty-five of the Eastbourne contingent of the Salvation Army. It does not appear, and there was no evidence, that these nine defendants had the smallest knowledge of that which was said to have been occurring upon two or three previous occasions. They joined that contingent on the piece of waste ground, and no one has suggested that anything was said or done there by the members of the Salvation Army or by the bandsmen which would tend to lead any reasonable man to suppose that they intended to do anything which might lead to the commission of a breach of the peace. They then proposed to go from the piece of waste land to the citadel, which was also property to which they had a right to go; and there again they would have been at liberty to play their band as long as they thought fit. Now, what is the conduct of the band? That it was intended to go in procession at all seems to be very much negatived in fact by what took place. Nine members of the band went down on to the beach, and the local contingent did not accompany them, but went by another route. It is quite certain that there was no intention that the nine bandsmen should accompany that procession playing their musical instruments. A large crowd had assembled at Latimer-road, and one would naturally ask oneself why was this body of persons collected round a peaceable body of men? What the crowd meant there seems no difficulty whatever in ascertaining. They were assembled for the express purpose of jeering the members of the Salvation Army, and of singing parodies on their hymns. The crowd followed the band on to the beach, until at last it numbered twelve to fifteen hundred persons at least, not one single one of whom during the whole time raised his hand to resent what I can only describe as a most brutal outrage on the band. The bandsmen had as much right to walk through the streets carrying their musical instruments as anyone has to walk through the streets without a musical instrument. The chief constable had at his command only thirty or forty men, and I cannot blame him with only those thirty or forty men for not coming into conflict with the crowd. Upon heading the band when it left the piece of waste ground he had not given them any warning that their proceeding, walking peaceably through the streets, would inflame the people. Now, what was the action of the bandsmen when walking along? There may have been two or three beats of a drum, but everyone who heard them must have known that it was not done with the intention of playing a musical instrument. There was not one single aggressive word used by them towards the fifteen hundred men in the crowd. It is quite true that two or three notes are said to have been pro-

REG.
v.
CLARKSON
AND OTHERS.

1892.

*Unlawful
assembly—
Assembly for
lawful object
—Commission
of acts
tending to
breach of
peace—Ignorance as to
probable effect
of acts.*

REG.
v.
CLARKSON
AND OTHERS.

1892.

*Unlawful
assembly—
Assembly for
lawful object
—Commis-
sion of acts
tending to
breach of
peace—Igno-
rance as to
probable effect
of acts.*

duced by one of the bandsmen with a horn, but the same remarks apply to that as to the beats on the drums. They clearly did not intend to infringe the law by what they did, because they did not attempt to play when they were told not to do so; and there cannot be conceived, under the circumstances, a more peaceable body of men than these nine defendants. Not so the crowd, however; they, without the smallest ground for taking the action they did, raised their sticks in the air close to the defendants; and one cannot help thinking that blows were falling on the heads of the bandsmen from them, and that, if the bandsmen did retaliate, it was not such a retaliation as would in our judgment cause an unlawful assembly, or would reasonably provoke a breach of the peace such as that which the indictment charges. Now, the indictment charges that these defendants did "assemble and gather together armed and provided with drums, cornets, and horns, and other musical instruments to disturb the peace of our said lady the Queen, and being so assembled and gathered together armed and provided with musical instruments as aforesaid, did then and there unlawfully make a great noise, tumults, and disturbance, and did then and there continue making such noise, tumults and disturbance, for the space of an hour or more next following, to the great disturbance and terror of liege subjects of our said lady the Queen;" that is to say, they did unlawfully assemble to disturb the peace. Now, what is the evidence that they unlawfully did assemble to disturb the peace? We find none. I do not say that it was necessary that there should have been an intention to break the peace from the outset; and I quite agree that if they, in the course of their progress along the streets, had formed such an intention, and had done anything by which a breach of the peace was committed or which would have led to a breach of the peace, that that would have formed the subject-matter for an indictment. But there was nothing from the first to the last which ought to have led any reasonable man to have supposed that the acts of the bandsmen would have caused others to do acts so grossly unlawful as the acts of the crowd, or that they were likely to do anything unlawful or likely to lead to a breach of the peace. I think therefore that this fourth count, upon which the defendants were found guilty, was not supported by the evidence; and the conviction must, in my opinion, be quashed.

WILLS, LAWRENCE, WRIGHT, and COLLINS, J.J. concurred.

Conviction quashed.

Solicitor for the prosecution, *J. H. C. Coles*, Town Clerk, Eastbourne.

Solicitors for the defendants, *Ranger and Burton*.

CROWN CASES RESERVED.

Saturday, Feb. 13.

(Before Lord COLERIDGE, C.J., HAWKINS, WILLS, LAWRENCE, and WRIGHT, JJ.)

REG. v. RING AND OTHERS. (a)

Practice—Attempt to commit felony—Evidence—Not necessary to show that attempt might have been successful.

In order to prove that an attempt to commit a felony has been committed, it is not necessary to prove that had the attempt not been frustrated the felony could have been committed.

Reg. v. Collins (33 L. J. 177, M. C.; L. & C. 471) is no longer law.

THIS was a case stated by the Deputy-Chairman of the County of London Quarter Sessions held in January, 1892, at Clerkenwell.

The prisoners Henry Ring, Thomas Atkins, and William Jackson were tried on an indictment, which charged them with an attempt to steal from the person of a person unknown, and with assaulting a person unknown with intent to commit a felony.

At the trial it was proved that the three prisoners were seen to hurry on to the platform at King's Cross station of the Metropolitan Railway just as a train which was going to Edgware Road was about to start; they did not go by that train, and separated on reaching the platform. On the arrival of the succeeding train, the prisoners crowded round and hustled a woman who was entering a compartment, and Atkins was seen endeavouring to find the pocket of her dress. The prisoners entered the train, got out of it at Gower-street station, and there again crowded round and hustled a woman who was entering the train, Atkins again endeavouring to find her pocket. They re-entered the train, got out at Portland-road station, entered the next train, and travelled in it to Baker-street station, where they got out and were arrested. They were found to be in possession of tickets from King's Cross to Edgware-road.

At the trial it was argued on behalf of the prisoners, on the authority of *Reg. v. Collins* (9 Cox C. C. 497; 10 L. T. Rep. N. S. 581; 33 L. J. 177, M. C.; L. & C. 471), that there was no case against them to go to the jury. The counsel for the prosecution argued that *Reg. v. Collins* had been overruled by *Reg. v. Brown* (16 Cox C. C. 715; 24 Q. B. Div. 357; 59 L. J. 47, M. C.).

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

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v.
RING AND
OTHERS.

1892.

Practice—
Attempt to
commit felony
—Evidence as
to possibility
of attempt
succeeding.

The Deputy-Chairman held that *Reg. v. Collins* had been overruled by the decision in *Reg. v. Brown*, and left the case to the jury, who convicted the prisoners.

The question for the opinion of the court was whether the Deputy-Chairman was right in leaving the case to the jury.

Forrest Fulton for the prosecution.—The case was stated with the object of ascertaining whether *Reg. v. Collins* is good law. It is stated in the report of *Reg. v. Brown* that *Rea v. Dodd* is no longer good law, and it is therefore contended that *Reg. v. Collins* is overruled by *Reg. v. Brown*.

Lord COLERIDGE, C.J.—This conviction must be affirmed. The case was stated to ascertain whether or not *Reg. v. Collins* is good law. That case was overruled by the decision in *Reg. v. Brown* (*ubi sup.*) a case decided by five judges, (a) and since this case will also be decided by five judges, one of whom was one of the judges who decided *Reg. v. Brown*, the learned judge who stated the case will have the satisfaction of knowing that now nine judges hold that *Reg. v. Collins* is bad law.

HAWKINS, WILLS, LAWRENCE, and WRIGHT, JJ. concurred.

Conviction affirmed.

Solicitor: *The Solicitor to the Treasury.*

CROWN CASES RESERVED.

Saturday, Feb. 13.

(Before Lord COLERIDGE, C.J., HAWKINS, WILLS, LAWRENCE, and WRIGHT, JJ.)

REG. v. DE KROMME. (b)

Conspiracy to cheat and defraud—Sale of goods by servant at less than authorised price—Offer of bribe to induce servant to sell—Soliciting to conspire to cheat.

A servant who, in order to make a profit for himself, sells his master's goods at less than their proper market value, thereby defrauds his master of the sum which represents the difference between the value of the goods and the price at which the servant has sold them. Where, therefore, a person was indicted for soliciting a servant to conspire to

(a) The case of *Reg. v. Brown*, referred to by the learned Chief Justice, was really decided by seven judges, namely: Lord Coleridge, C.J., Pollock, B., Field, Manisty, Cave, Charles, and Grantham, JJ.

(b) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

cheat and defraud his master, and it was proved that such person had offered a bribe to the servant as an inducement to him to sell certain goods of his master at less than their value. :—

Held, that he might properly be convicted of such conspiracy.

REG.
v.
DE KROMME.
1892.

CASE stated by the Recorder of London, setting out the following facts :—

The prisoner, Jacob de Kromme, was indicted for soliciting and inciting one Samuel Dash, servant to John Thomas Whitley and others trading as Ridley, Whitley, and Co., to steal certain goods and chattels, the property of Ridley, Whitley, and Co., and also for inciting Dash to conspire with him to cheat and defraud Ridley, Whitley, and Co. of their goods and chattels. The indictment on which the prisoner was charged contained five counts, of which the fourth charged that Jacob de Kromme

Conspiracy to cheat and defraud—Soliciting to conspire to cheat—Inducement held out to servant to sell master's goods at less than authorised price.

Wickedly and designedly did solicit and incite the said Samuel Dash, then being such servant to the said John Thomas Whitley and others, trading together as Ridley, Whitley, and Co. as aforesaid, a certain indictable misdemeanour unlawfully to do and commit, to wit, did then and there unlawfully solicit and incite the said Samuel Dash, unlawfully, fraudulently, and deceitfully to conspire, combine, confederate, and agree with himself the said Jacob de Kromme unlawfully to cheat and defraud and deprive the said John Thomas Whitley and others of their goods and chattels and moneys, &c.

It appeared, from evidence set out in the case, that Samuel Dash was manager to Ridley, Whitley, and Co., who are manufacturers of floor cloth, and that the prisoner, being then a stranger to him, came on the 1st day of October, 1891, to the warehouse of Messrs. Ridley, Whitley, and Co. in Essex-road, and said that he, De Kromme, desired to buy a "job lot of floor cloth." Dash having shown the prisoner several such lots, and having told him the price, the prisoner said to Dash "I will make it all right for you, you understand," at the same time pushing a sovereign into Dash's hand. Dash returned the sovereign and showed the prisoner several lots, offering to sell them to him at 20*l.* The prisoner then said to him "Take 10*l.* and 2*l.* for yourself." On Dash's refusing to sell the goods on these terms, the prisoner offered him successively 12*l.* and 2*l.*, 14*l.* and 2*l.*, 16*l.* and 2*l.*, and eventually 18*l.*, this being the lowest price at which Dash was authorised to sell the goods. Before Dash had finally agreed to sell the goods at 18*l.* the prisoner again endeavoured to slip a sovereign into his hand. On the following day the prisoner again went to the warehouse, and asked Dash "to make up a job lot of goods," promising that he would give him a fiver for himself."

On the 7th day of October the prisoner again came to the warehouse, and on Dash showing him a parcel of goods, telling him that 150*l.* was the lowest price, he again offered Dash a sovereign.

On the 8th day of October the prisoner attempted to induce Dash to accept a suit of clothes and a sovereign, and showed him

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v.
DR KROMME.

1892.

*Conspiracy
to cheat and
defraud—
Soliciting to
conspire to
cheat—In-
ducement held
out to servant
to sell master's
goods at less
than autho-
rised price.*

a pocket-book containing bank notes, saying "I will give you a piece of paper." On the evening of the same day the prisoner went to Dash's house, and said to Dash, "I will give you a piece of paper." Dash said, "What do you mean by a piece of paper?" The prisoner replied, "A 5*l.* note." Dash then said, "Which lot do you propose to buy!" to which the prisoner answered, "The 184 pieces," and said he would give 80*l.* for them. The 184 pieces constituted the lot which Dash had offered to sell to the prisoner at 150*l.*

At the trial it was argued on behalf of the prisoner that there could be no such conspiracy as was alleged in the fourth count of the indictment, inasmuch as no moneys had passed into the possession of the prosecutors, and that a person could not be defrauded of what he had not got. It was also argued on behalf of the prisoner that had Dash yielded to his solicitations and sold the goods at less than the price at which he was authorised to sell, he would not have committed larceny, and that therefore the prisoner could not be convicted of inciting Dash to commit larceny. The whole indictment was left to the jury, who convicted the prisoner. The learned Recorder stated the case, and the question for the opinion of the court was whether he was right in leaving any of the counts to the jury.

Forrest Fulton, for the prisoner, submitted that the conviction on the fourth count was bad, since there was no evidence that the prisoner knew that Dash was not authorised to sell at less than the specified price. That inasmuch as corrupting public servants had been made a misdemeanour by 52 & 53 Vict. c. 68, it could not have been an offence before the passing of that statute to bribe servants, for otherwise the enactment would not have been necessary. That "cheating" is defined in *Stephen's Digest of the Criminal Law*, as a practice of such a nature that it directly affects, or may directly affect, the public at large; and, if the prisoner had succeeded in obtaining the goods at his price, the public would not have been affected. There would have been no wrong done if the prisoner had been dealing directly with Dash's master.

O. M. Matthews, for the prosecution was not called upon.

LORD COLERIDGE, C.J.—I have no doubt in this case. The prisoner approached the foreman of a merchant, and attempted to obtain goods from him at a price less than that at which they could have been sold at a profit. If the foreman had sold the goods at such a price his master would have been defrauded. There was an attempt to bring another mind into combination to do this. The statute which has been cited to us has nothing to do with the point. That is a statute which fixes a punishment for the corruption of public servants. The point is very much the same as that considered by Lord Denman in the case of *Reg. v. Kenrick* (5 Q. B. 49). There the question was whether money obtained through the medium of a contract between the defendant and the person defrauded could be said to have been

obtained by false pretences; and in holding that it could be said to have been so obtained, Lord Denman dealt with the case of *Reg. v. Codrington* (1 C. & P. 661). I am of opinion that this conviction was right and must be affirmed.

HAWKINS, WILLS, LAWRENCE, and WRIGHT, JJ. concurred.

Conviction affirmed.

Solicitor for the prosecution, *Joseph Crawshaw*.

Solicitor for the prisoner, *G. A. Young*.

REG.
v.
DE KROMME.
1892.

Conspiracy to cheat and defraud—Soliciting to conspire to cheat—Inducement held out to servant to sell master's goods at less than authorised price.

CROWN CASES RESERVED.

Saturday, Feb. 13.

(Before Lord COLERIDGE, C.J., HAWKINS, WILLS, LAWRENCE, and WRIGHT, JJ.)

REG. v. DUCKWORTH. (a)

Attempt to discharge loaded firearm—Intent—Question for jury—Evidence.

Where a person does an act the natural consequence of which is criminal, but such consequence is prevented by extraneous causes, he is nevertheless to be taken to have intended that the natural consequence of his act should result, that is to say, he is to be considered as having intended to commit the crime which would have resulted had he not been prevented from completing his act.

Where, therefore, in support of a conviction for attempting to discharge a loaded firearm with intent to do grievous bodily harm, the evidence was that the prisoner had presented a loaded revolver at another person, but had been prevented from discharging it by a third person:

Held, that the question as to the intent with which the prisoner presented the revolver was for the jury to decide; that the jury might reasonably infer that the prisoner intended to do that which he was prevented from doing; and that there was therefore sufficient evidence to support the conviction.

Reg. v. St. George (9 C. & P. 483); and *Reg. v. Lewis* (9 C. & P. 523) overruled.

THIS was a case reserved by Lawrence, J. at the assizes held at Liverpool in December, 1891, from the facts stated in which it appeared that: The prisoner was indicted under 24 & 25 Vict. c. 100, s. 18, for feloniously, unlawfully, and maliciously attempting to discharge a loaded pistol at Elizabeth Kelly. The

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

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DUCKWORTH.

1892.

Attempt to
discharge
loaded firearm
—Intent—
Question for
jury—Evi-
dence.

fifth count of the indictment was as follows: that he did "feloniously, unlawfully, and maliciously attempt to discharge at Elizabeth Kelly a certain loaded arm, to wit, a certain pistol loaded then in two barrels with gunpowder and divers leaden bullets, by drawing the said loaded arm from his pocket, and by pointing the same at the said Elizabeth Kelly, and by placing his finger upon the trigger thereof, and by attempting to draw the trigger thereof, and by attempting to draw the said trigger for the purpose of doing grievous bodily harm to the said Elizabeth Kelly, with intent in so doing to do grievous bodily harm to the said Elizabeth Kelly against the form, &c."

The prisoner, who was the son of Elizabeth Kelly, having previously stated that he intended to buy a revolver and blow out his mother's brains, went to her house, and entering the room in which she was, pulled a revolver loaded in two chambers from his pocket, pointed it at her, and said "I will give you this." Before he was able to discharge the revolver, and while he was in the act of raising it towards his mother, who then ran out of the room, he was seized by a third person, and the revolver was taken from him. The revolver was a very small one, and the handle, trigger, guard, and hammers were almost covered by the prisoner's hand, but his finger and thumb were seen to be fumbling in the revolver.

The learned judge directed the jury that if they believed that the prisoner did attempt to discharge the pistol at his mother by putting his finger on the trigger, and attempting to pull it, and was only prevented by the interference of the third person, they could convict him upon the fifth count.

The question for the consideration of the court was whether, having regard to the decisions in *Reg. v. St. George* (7 C. & P. 483) and *Reg. v. Lewis* (9 C. & P. 523), the learned judge was right in so directing the jury.

No one appeared on behalf of the prisoner.

Cottingham (with him *Tobin*) for the prosecution.—The prisoner put his finger on the trigger, and the question is whether that constituted an attempt to discharge the revolver with an intent to do grievous bodily harm to the prosecutrix. In *Reg. v. St. George* (9 C. & P. 483) Parke, B. held that a man, indicted under 7 Will. 4 & 1 Vict. c. 85, ss. 3, 4, who presented a loaded pistol at the prosecutor, and put his finger on the trigger, but was prevented from pulling the trigger, could not be found guilty of an attempt to discharge a loaded arm, there being no evidence that the pistol was cocked, but the authority of that case was doubted in *Reg. v. Brown* (10 Q. B. Div. 31). He referred also to the definition of attempt in Stephen's Digest of the Criminal Law.

LORD COLERIDGE, C.J.—I am clearly of opinion that this conviction should be affirmed. My learned brother very properly stated the case in order to ascertain whether his direction to the jury was right, he considering that he was bound by the authority

of the cases of *Reg. v. Lewis (ubi sup.)* and *Reg. v. St. George (ubi sup.)*, and desiring to have the decision of this court as to whether those cases are good law. *Reg. v. Lewis* is, in my opinion, clearly wrong, though in that case the blunderbuss, having no flint in it, was incapable of being discharged. I think also that *Reg. v. St. George* ought to have been got rid of before now; there the man raised his arm, and it is reasonably clear to the ordinary mind that a man intends to do that which he is prevented from doing. Then there is the question of "intent." If a statute enacts that an act must be done with "intent," the question of intent must be left to the jury. The prisoner was in this case charged with doing the act with intent, and a quantity of evidence, such as that he purchased a firearm, went to the house, all evidence showing "intent," having been given, the jury found the prisoner guilty, and must be assumed to have found the prisoner guilty of the "intent," and I am informed by my learned brother, as I assumed before he so informed me, that he did actually leave the question of "intent" to the jury. A jury must be told that they are the judges of the intent, and that they must assume that a man intends to do that which is the natural consequence of his act. I think, therefore, that this conviction was right, and must be affirmed.

HAWKINS, WILLS, LAWRENCE, and WRIGHT, JJ. concurred.

Conviction affirmed.

Solicitor for the prosecution, *The Solicitor to the Treasury.*

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v.
DUCKWORTH.
—
1892.
—
*Attempt to
discharge
loaded firearm
—Intent—
Question for
jury—Evi-
dence.*

QUEEN'S BENCH DIVISION.

Monday, Dec. 21, 1891.

(Before SMITH and WRIGHT, JJ.)

Re PINTER. (a)

Extradition—Obtaining money by false pretences—Evidence of guilty knowledge—False representation by conduct—Application for habeas corpus.

*Bonds, which had been stolen in 1883, were found in 1890 in the possession of the prisoner who, under an assumed name, was dealing with them and selling them to innocent purchasers:—
Held, that there was evidence of guilty knowledge on which a magistrate in this country might commit the prisoner for trial;*

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

Re PINTER.

1891.

*Extradition—
False pre-
tences—Re-
presentation
by conduct—
Evidence of
guilty know-
ledge—
Habeas
corpus.*

and that, assuming that the prisoner knew that the bonds had been stolen, his conduct amounted to a false representation of their genuineness, which was not cured by the fact that, the bonds passing freely from hand to hand, an innocent purchaser would be able to get his money back again.

THIS was an application for a *rule nisi* for the issue of a writ of *habeas corpus*, calling upon the Governor of Holloway Gaol to bring up a prisoner named Pinter, who was detained there under an extradition warrant issued by Sir John Bridge at Bow-street, on a charge of obtaining money by false pretences.

The evidence showed that the accused, who at the time was passing under an assumed name, was in 1890 in possession of a number of bonds, which had been stolen from Messrs. Baring in 1883, and that, during a period of a few months, he had sold several of these bonds to innocent purchasers. The magistrate considered that there was evidence of the prisoner's guilty knowledge, and that the facts amounted to a false representation by conduct. He therefore issued his warrant, and the accused was sent to Holloway Gaol.

C. F. Gill in support of the application for the rule.—There was no evidence on which a magistrate in this country would be justified in committing the accused for trial. Possession of stolen property after so long an interval as seven years, and the assumption of a fictitious name, are no evidence of guilty knowledge. There was no false representation of an existing fact, either by words or by conduct. These bonds pass freely from hand to hand, and the purchaser is not damnified by the fact that they were stolen, since he will be paid in full upon presenting them for payment as certainly as if they had not been stolen.

SMITH, J.—In this case the prisoner has been charged with obtaining money under false pretences, and this Court has jurisdiction to see if there is any evidence to justify his extradition. Now, in the first place, is there any evidence of guilty knowledge? The bonds were stolen in 1883, and in 1890 the prisoner, under an assumed name (I cannot leave that out of my consideration), is found dealing with them. In the face of those facts, I could not withdraw the case from the jury. Secondly, did he make a false pretence, either by words or by conduct? Let it be taken that he was affected with guilty knowledge; in my judgment there is a representation that the bonds were all right and not stolen ones—a representation by conduct constituting a false pretence. But it is said that the payee did not lose anything by the prisoner's conduct; but in my judgment that is no answer to a charge of false pretences. It is no answer to such a charge to say that the person cheated out of his money can get it back again. This rule must be refused.

WRIGHT, J.—I am of the same opinion, although I confess the question does not appear to be entirely free from doubt. If the

prisoner had put in negotiation a single stolen bond, the case might be doubtful; but the facts here are stronger, and lead to the inference that he had possession of a number of stolen bonds, and that he deliberately and systematically passed them on to the public, representing that there was nothing the matter with them.

Rule for habeas corpus refused.

Solicitors: *Arthur Newton and Co.*

Re PINTER.

1891.

*Extradition—
False pre-
tences—Re-
presentation
by conduct—
Evidence of
guilty know-
ledge—
Habeas
corpus.*

OXFORD CIRCUIT.

STAFFORDSHIRE SPRING ASSIZES.

March 30, 31, April 1, 2, and 4, 1892.

(Before HAWKINS, J.)

REG. v. CHARLES AND OTHERS. (a)

Explosive substance—Part of machine adapted for causing explosion—Possession of confederates—46 Vict. c. 3, ss. 3, 4, 9.

The Explosive Substances Act, 1883 (46 Vict. c. 3), enacts, sect. 9, "The expression 'explosive substance' shall be deemed to include any . . . apparatus, machine, implement, or materials used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; also any part of any such apparatus, machine, or implement":—

Held, that any part of a vessel which, when filled with an explosive substance, is adapted for causing an explosion (i.e., for causing it to explode so as to be dangerous to life, limb, or property) is an explosive substance within the Act.

Sect. 4 provides that any person who makes or has in his possession and under his control any explosive substance under certain circumstances, shall be liable to penal servitude, &c.:—

Held, that if several persons are connected in a common design to have articles, amounting to an explosive substance within the Act, made for an unlawful purpose, each of the confederacy is responsible in respect of such articles as are in the possession of others connected in the carrying out of their common design.

THE prisoners Frederick Charles, Victor Cails, John Wesley, William Ditchfield, Joseph Thomas Deakin, and Jean

(a) Reported by EDWARD J. GIBBONS, Esq., Barrister-at-Law.

REG.
v.
CHARLES AND
OTHERS.

1892.

*Explosive
substance—
Part of
machine
adapted for
causing ex-
plosion—
Possession of
confederates—
46 Vict. c. 3,
ss. 3, 4, 9.*

Battolla were indicted, firstly, for conspiracy under sect. 3 of the Explosive Substances Act, 1883 (46 Vict. c. 3); and, secondly, for offences under sect. 4. The first indictment was not proceeded with, and in the second indictment were sixteen counts, but it is only necessary for this report to state one count at length; it was as follows: "And the jurors aforesaid, upon their oath aforesaid, do further present that the said (*prisoners*) on the 7th day of January, 1892, feloniously, unlawfully, and knowingly had in their possession, not for a lawful object, within the said county to wit, in the said borough, a certain explosive substance to wit, a certain lead bolt, being part of a machine adapted for causing an explosion with an explosive substance under such circumstances as to give rise to a reasonable suspicion that they did not have the said explosive substance in their possession for a lawful object against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown, and dignity." Three other counts were in exactly the same words, except that for "lead bolt" the words were "fuse," "brass bolt and screw," and "brass-casting," and these were alleged in the evidence to be the various parts of a vessel which, when filled with the chlorate of potash or other explosive substance, formed a bomb of a highly dangerous character. These four counts were those on which the prosecution eventually relied, but it may be shortly stated that the other twelve, abandoned at the trial, alleged the same materials as being "in their control" instead of "in their possession," and as being "intended to be used" instead of "adapted."

The following is a short statement of the evidence so far as is material to this report. A socialist club had been formed at Walsall about 1887, and all the prisoners except Battolla were members of that club. On the 7th day of January, 1892, the police arrested Ditchfield, Charles, and Cails, and they found in Ditchfield's possession the brass screw, in Charles's possession the lead bolt, materials mentioned in the indictment, and a sketch of a bomb with certain written directions for its manufacture in the handwriting of Battolla, and references to the brass screw. In a portmanteau belonging to Cails was found the fuse. It was also proved that Wesley, a brushmaker, had, at the request of Charles, made a wooden model, and had been instrumental in obtaining some iron castings according to pattern; and some further evidence was given as to the making of the materials mentioned in the indictment, and as to the connection of the prisoners with those transactions. Wesley and Ditchfield gave evidence, under sect. 4, admitting their possession of such materials; but they swore they were innocent agents, and thought that the castings were for electric cells or for lubricators. It was proved by expert evidence that these castings, when loaded, were adapted for explosion, and that they might be exploded in a variety of ways, by detonating caps, which might be placed on a nipple, by the use of a fuse, or by the use of

sulphuric acid in a little tube stopped at the bottom with a peculiar sort of cork of a certain thickness, which after a while the sulphuric acid would eat away and so come in contact with the explosive matter and cause it to explode. Among some documents found in Cails' possession was a newspaper description of how such bombs loaded with chlorate of potash might be used to cause an explosion at an opera house. Deakin also made a statement, but did not give evidence, substantially admitting the charge against himself, but he said he thought the bombs were to be used abroad.

Sir *R. E. Webster*, Q.C. (A.-G.), *Jelf*, Q.C., *Alfred Young*, and *H. Sutton* for the prosecution.

Willis, Q.C. and *Cranstoun* for the prisoner Charles.

W. M. Thompson and *Lever* for the prisoners Cails, Ditchfield, and Battolla.

Boddam for the prisoner Wesley.

McCarthy for the prisoner Deakin.

At the close of the case for the prosecution,

Willis submitted that there was no case to go to the jury, inasmuch as there was no evidence that the thing alleged to be in the possession of the prisoners was adapted for causing an explosion. The prisoners were charged under sect. 4 of the Explosive Substances Act, 1883 (*a*) with which must be read sect. 9 (*b*). The only thing found in Charles's possession was the lead bolt, which was merely a stopper used to close the container or shell in which the explosive substance might be placed. It was not intended by the Act to call upon a person to account for the possession of any article which did not come under one of two heads, either (1) that of the explosive substance itself, or the materials entering into the manufacture; or (2) the machinery for causing the explosion, or a part of it which is adapted for causing or aiding in causing it. The Act was not intended to apply to a person in possession of a vessel adapted for receiving an explosive substance, or which by containing the explosive substance might give increased force to the explosion after the explosion had been caused. Secondly, he submitted that the brass casting mentioned in the indictment was not found in the possession of any of the prisoners at the time they were arrested, and assuming it was a material adapted for aiding in causing an explosion, under sect. 4,

(*a*) 46 Vict. c. 3, s. 4, enacts that: "Any person who makes or knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it, or does not have it in his possession or under his control for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be guilty of felony, and, on conviction, shall be liable to penal servitude, &c.

(*b*) Sect. 9 (1). In this Act, unless the context otherwise requires, the expression "explosive substance" shall be deemed to include any materials for making any explosive substance; also any apparatus, machine, implement, or materials used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; also any part of any such apparatus, machine, or implement.

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a person who had once had it in his possession and parted with it was not called upon to explain with what purpose he had it in his possession. Each prisoner was therefore responsible only for any article found in his own possession.

The same arguments were relied on by the other counsel for the prisoners.

The *Attorney-General* argued that the suggestion on behalf of the prisoners was that the statute merely applied to explosions without consequences, in other words, that the putting of powder or any other explosive substance in an open vessel or on the ground and exploding it might be aimed at by the statute, but that that which rendered the explosion most disastrous and dangerous to human life, *i.e.*, the shell which contains the explosive, was not within the statute. He submitted that the sort of explosion aimed at was that mentioned in sect. 2, "an explosion of a nature likely to endanger life or to cause serious injury to property." Sect. 5 makes accessories liable to be tried and punished as principals. As to the second contention it was not necessary that each one of the things should be traced to the possession of any one of the prisoners. They were acting together for a combined purpose, and, as in the case of being in possession of stolen coin or stolen goods, or unlawfully uttering coin, and numbers of other cases where the act might be the act of more than one, still it was the possession and control of each. Assuming that there had been no possession traced except in the case of the fuse to Cails, the lead bolt to Charles, and the brass bolt to Ditchfield, that would not avail in respect of the act alleged, namely, their collective possession for an unlawful purpose with a view of doing that which was an offence under the Act, those articles not intended of course to be used independently, but intended to be used subsequently together.

HAWKINS, J. decided against Mr. Willis's contention, and allowed the case to go to the jury. He said he thought the case so clear, that he refused to state a case for the Court for the consideration of Crown Cases Reserved. On the points argued, he summed up the case to the jury as follows:—I have pointed out to you what each of the defendants has done, for the purpose of your forming your own judgment, as to whether or not they were connected in one common design to have these articles manufactured; and with the view to comply with that which I hold to be the law, that if they were connected in a common design to have these articles made, and for an unlawful purpose, that each member of the confederacy is responsible in respect of such articles as were in the possession of others, connected, of course I mean, in the carrying out of their common design. Was that design a lawful one? Was it a possession under circumstances calculated to raise grave suspicion? Were these things which were found in the possession of the prisoners, the brass screw in the possession of Ditchfield, the lead bolt in the possession of Charles, the fuse in the possession of Cails, and

the brass casting, undoubtedly at one time in the possession of Ditchfield, and at some time in the possession of Charles, were these things first of all parts of a machine intended for the purpose of explosion? Were they parts of a machine adapted according to the language of the statute for causing an explosion, that is for causing it to explode so as to be dangerous to life, limb, or property? If you find they were, they are "explosive substances" under the Act.

The jury found Wesley and Ditchfield not guilty; Charles, Cails, and Battolla, guilty; and Deakin, guilty, with a recommendation to mercy.

Charles, Cails, and Battolla, were sentenced to ten years, and Deakin to five years penal servitude.

Solicitors: for the prosecution, *The Solicitor to the Treasury*; for Charles, *Gore*, of Bristol; for Wesley, *G. Rose*, of Wednesday; for Deakin, *Maw*; for Cails, Ditchfield, and Battolla, *Cotterell*, of Walsall.

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MIDLAND CIRCUIT.

NOTTINGHAM ASSIZES.

March 22, 1892.

(Before CAVE, J.)

REG. v. MITCHELL. (a)

Practice — Evidence — Admissibility — Murder — Dying Declaration — Examination by justice of the peace — Statement giving substance of question and answer — Hopeless expectation of immediate death — Deposition under 30 & 31 Vict. c. 35, s. 6 — Increased illness of witness — Stoppage of cross-examination — "Full opportunity of cross-examination" — Admissibility as statement in presence of prisoner.

Upon an indictment for murder or manslaughter a statement giving the substance of questions put to and answers given by the deceased person is not admissible in evidence as a dying declaration.

Such a declaration must, in order that it may be admissible in

(a) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

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evidence, be in the actual words of the deceased, and if questions are put, the questions and answers must both be given, in order that it may appear how much was suggested by the examiner, and how much produced by the person making the declaration.

Upon the trial of an indictment for murder it appeared that the deceased was told by a doctor that there was little or no hope of recovery, and being asked if she understood her position replied that she did:—

Held, that there was no proof of a hopeless expectation of immediate death sufficient to make a subsequent declaration admissible in evidence as a dying declaration.

During the taking of the deposition of a person dangerously ill under 30 & 31 Vict. c. 35, s. 6, before the prisoner's solicitor had concluded his cross-examination, the witness became so ill that the presiding magistrate stopped the cross-examination:—

Held, that it was not sufficient that the prisoner should have had such opportunity of cross-examination as the circumstances permitted, and that, as the prisoner had not had full opportunity of cross-examination, the deposition was, in the absence of any proof that the prisoner was asking vexatious questions in order to defeat the statute, inadmissible in evidence;

Held, also, that it was inadmissible in evidence as a statement made in the presence of the prisoner, the ground of the admission of such statements in evidence being that where a charge is made against a person in his presence, and he does not deny it, the absence of denial is some evidence of the truth of the charge, whereas where evidence is being formally taken, and the prisoner is represented by a solicitor, it is not to be expected that he will at once deny the statements made, and therefore no presumption arises from the absence of denial.

Reg v. Mann (49 J. P. 743) dissented from.

THE prisoner, Lizzie Ann Mitchell, was indicted for the wilful murder of Eugenie Bagshaw at Nottingham on the 16th day of December, 1891.

The substance of the charge against the prisoner was that she procured a miscarriage of the deceased woman either by the use of instruments or other means, and that death resulted from the miscarriage.

Garrett and Dove for the prosecution.

H. Y. Stanger for the prisoner.

It appeared from the evidence that the deceased woman had been married for fourteen years and had a family of seven children. In October, 1891, she again found herself to be pregnant, and during the latter part of October and the beginning of November paid several visits to the prisoner, who carried on business as a herbalist. On the 8th day of November the deceased woman was taken ill and the prisoner was sent for, and was with her alone for some time, and visited her constantly for the next four days. At the end of that time serious symptoms

developed and a doctor was called in. The prisoner then entirely discontinued her visits, and on the 16th day of December the woman died, the cause of death being blood poisoning, consequent on a miscarriage and the non-removal of the after birth.

C. V. Taylor, M.D. deposed.—On the 14th day of December I was present at the bedside of the deceased woman, together with a magistrate, the assistant clerk to the justices, and certain others. Her life was then in imminent danger. I told her that there was little or no chance of her recovery, and asked her if she understood her present condition. She replied that she did.

H. Worth, assistant clerk to the justices, deposed.—I was present on the 14th day of December on the occasion mentioned by the previous witness. After the deceased woman had stated that she understood her condition the magistrate put questions to her, and I took down the answers. She then signed the statement I had taken down with a mark.

Garrett, for the prosecution, tendered the statement as a dying declaration.

CAVE, J.—I think that there are two objections to the reception of this statement as a dying declaration. In the first place I do not think that there is sufficient proof that the deceased woman had a settled hopeless expectation of immediate death, and, secondly, even if there were sufficient proof of this, I do not think that the statement contains sufficiently the actual words of the dying woman. In such case her answers, even if taken word for word, seem to me to be useless without the questions to which they were answers, and when a person is in such a condition the danger arising from leading questions is enormously increased.

H. Worth, recalled, deposed.—On the following day, the 15th day of December, I was present when the statutory deposition of the deceased woman was taken. Notice was given to the prisoner, and she and her solicitor were present. The deceased woman was sworn and examined upon oath. I took down her evidence. The prisoner's solicitor began to cross-examine the deceased woman, and had continued his cross-examination for about ten minutes, when the state of the woman was such that the magistrate stopped the cross-examination. She was apparently dying and gradually got worse, and a few minutes afterwards we all left.

Garrett tendered the deposition under 30 & 31 Vict. c. 35, s. 6 (a). The words "full opportunity" in the section mean

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(a) The statute 30 & 31 Vict. c. 35, s. 6, enacts that: Wherever it shall be made to appear to the satisfaction of any justice of the peace that any person dangerously ill, and, in the opinion of some registered medical practitioner, not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, and it shall not be practicable for any justice or justices of the peace to take an examination or deposition in accordance with the provisions of the said Act of a person so being ill, it shall be lawful for the said justice to take in writing the statement on oath or affirmation of such person so being ill, and such justice shall thereupon subscribe the

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“as full opportunity as is compatible with the circumstances of the case.” Otherwise an accused person might well defeat the section by so extending his cross-examination as to compel the magistrate, in the interest of the sick person, to cut short the examination. If the statement is not admissible as a deposition under the statute, it is submitted that it is admissible as a dying declaration, and also as a statement made in the presence of the prisoner. In *Reg. v. Mann* (49 J. P. 743), Denman, J. admitted, upon the latter ground, evidence of a statement which was inadmissible as a dying declaration and as a deposition.

Stanger for the prisoner.—The statement is not admissible as a deposition under the statute, inasmuch as neither the prisoner nor his solicitor had full opportunity of cross-examining the deceased person within the meaning of the section. Further it is not admissible as a dying declaration upon the grounds upon which the Court has just held the statement of the previous day inadmissible as such. Nor is it admissible upon the other ground suggested. *Reg. v. Mann* (*ubi sup.*) was wrongly decided. If the statement had been made in such circumstances that the prisoner might have contradicted it, it might have been admissible, but, inasmuch as it was made in such circumstances that she would not have been allowed to interrupt the proceedings by contradicting it, it is not admissible. The only reason for admitting statements made in the presence of a prisoner is that if a prisoner hears charges made against him or her, and does not contradict them, the absence of such contradiction is evidence of guilt. Moreover, if depositions of this kind are to be admitted upon this ground, all the careful provisions of the section for the due protection of the prisoner would be at once swept away.

CAVE, J.—I am of opinion that this statement is not receivable in evidence upon any of the grounds suggested. What was intended to be done upon the 15th was to take a deposition under the statute 30 & 31 Vict. c. 35, s. 6, but in order that a depo-

same, and shall add thereto by way of caption a statement of his reason for taking the same, and of the day and place when and where the same was taken, and of the names of the persons (if any) present at the taking thereof; and, if the same shall relate to any indictable offence for which any accused person is already committed, or bailed to appear for trial, shall transmit the same, with the said addition, to the proper officer of the court for trial at which such accused person shall have been so committed or bailed; and in all other cases he shall transmit the same to the clerk of the peace of the county, division, city, or borough in which he shall have taken the same, who is hereby required to preserve the same, and file it of record; and if afterwards upon the trial of any offender or offence to which the same may relate the person who made the same statement shall be proved to be dead, or if it shall be proved that there is no reasonable probability that such person will be ever able to travel, or to give evidence, it shall be lawful to read such statement in evidence, either for or against the accused, without further proof thereto, if the same purports to be signed by the justice by or before whom it purports to be taken, and provided it be proved to the satisfaction of the court that reasonable notice of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person or his counsel or attorney, had or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased person who made the same.

sition may be admissible under the statute, it is necessary that the prisoner should have had full opportunity of cross-examining the person who made the deposition, whereas here the cross-examination was closed by the magistrate refusing to allow more questions to be put. To my mind it is impossible to say that there has been a full opportunity of cross-examination in such circumstances, unless it can be shown that the prisoner or the person representing him was putting vexatious and frivolous questions, and was evidently merely wasting time with the object of inducing the presiding magistrate to stop the cross-examination, and of taking advantage of the provisions inserted in the section for the benefit of the prisoner for the purpose of defeating it. There is not the slightest evidence of such a state of things here. Unfortunately the woman was so ill at the time that she was unable to comprehend the drift of the questions put to her, and therefore the cross-examination could not properly be continued. The magistrate was quite right in the circumstances in stopping the cross-examination, and unfortunately the effect is that the deposition was not taken in accordance with the statute, and is not therefore admissible in evidence. It was suggested that, if the statement taken is not admissible as a deposition under the statute, it may be as a dying declaration. In my opinion it was not a dying declaration at all, but an examination, and it is not an examination which is admissible upon this ground, but a declaration. A declaration should be taken down in the exact words which the person who makes it uses, in order that it may be possible, from those words, to arrive precisely at what the person making the declaration meant. When a statement is not the *ipsissima verba* of the person making it, but is composed of a mixture of questions and answers, there are several objections open to its reception in evidence which it is desirable should not be open in cases in which the person has no opportunity of cross-examination. In the first place the questions may be leading questions, and in the condition of a person making a dying declaration there is always very great danger of leading questions being answered without their force and effect being fully comprehended. In such circumstances the form of the declaration should be such that it would be possible to see what was the question and what was the answer, so as to discover how much was suggested by the examining magistrate, and how much was the production of the person making the statement. It appears to me, therefore, that a statement taken down as this was, giving the substance of questions and answers cannot be said to be a declaration in such a sense as to make it admissible in evidence, and that this document cannot be admitted upon that ground. There is also another objection that it does not appear that the woman was at the time in the expectation of immediately impending death. I have already held that there is no evidence that she was, upon the previous day, in a state of expectation of immediately impending death. There is no proof that upon that day she had

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come to any conclusion upon the matter. She quite understood, indeed, what the doctor said to her, but there is nothing to show that she agreed with him, and it is quite clear that, although a doctor may be of opinion and tell his patient that there is no hope, yet, if the patient thinks he has a chance of recovery, no declaration made by him is admissible in evidence. I cannot see that there is any proof that on the 15th, more than on the previous occasion, the woman had a settled expectation that death was immediately approaching. On this ground also, I think the statement is not admissible in evidence as a dying declaration. Thirdly, it was said that the statement, although not admissible as a deposition or a dying declaration, was admissible as a statement made in the presence of the prisoner, and not contradicted by her. Now the whole admissibility of statements of this kind rests upon the consideration that if a charge is made against a person in that person's presence it is reasonable to expect that he or she will immediately deny it, and that the absence of such a denial is some evidence of an admission on the part of the person charged, and of the truth of the charge. Undoubtedly, when persons are speaking on even terms, and a charge is made, and the person charged says nothing, and expresses no indignation, and does nothing to repel the charge, that is some evidence to show that he admits the charge to be true. But, where a statement is made in such circumstances that the prisoner cannot repel the charge, it is absurd to say that his remaining silent is any evidence of the truth of the charge. In this case, where a woman was lying on her deathbed, and her evidence was being formally taken, the last thing in the world to be expected is that the prisoner should have started up and denied it, and said that all the woman was saying was untrue, especially when she was represented by a solicitor, and knew that her solicitor would be allowed to ask questions in turn, and that everything would be done for her which could be done. It would in my opinion be simply monstrous to say that because she did not do so, that is to be taken as evidence of her guilt. I am clearly of opinion, therefore, notwithstanding the case of *Reg. v. Mann* (49 J. P. 743), in which I think my learned Brother must have been misreported, that this statement is not admissible in evidence upon this ground, or upon any of the grounds which have been suggested.

The prosecution offered no further evidence, and Cave, J., thereupon directed the jury to return a verdict of not guilty.

Not Guilty.

Solicitors: for the Crown, *Hunt and Williams*, Nottingham, for the *Solicitor to the Treasury*, *H. B. Clayton*, Nottingham, for the prisoner.

QUEEN'S BENCH DIVISION.

January 25 and 26, 1892.

(Before HAWKINS and WILLS, JJ.)

BROWN (app.) v. FOOT (resp.). (a)

*Adulteration of Milk—Water added by servant employed to sell—
Conviction of master—Non-connivance of master no defence—
38 & 39 Vict. c. 63 (Sale of Food and Drugs Act, 1875), s. 6.*

*The servant of a milk salesman, employed by his master to sell milk, adulterated it with water. The master was convicted as the seller of the adulterated milk under sect. 6 of the Sale of Food and Drugs Act, 1875, and fined the full penalty of 20l. :—
Held, that the conviction was right, whether the master did, or did not, connive at the offence, although the entire absence of connivance on his part might, in the discretion of the convicting magistrate, be a ground for a mitigation of the penalty.*

THIS was a case stated for the opinion of the Court under 42 & 43 Vict. c. 49, s. 33, by Henry Jeffreys Bushby, Esq., one of the magistrates of the police courts of the metropolis, sitting at the Police-court, in Worship-street, who heard and determined the summons hereinafter mentioned.

1. At a court of summary jurisdiction, holden at Worship-street Police-court aforesaid, on the 24th day of July, 1891, the appellant appeared before the said magistrate to answer a summons taken out by the respondent, charging that the appellant, on the 4th day of July, 1891, in Shipton-street, in the parish of St. Matthew, Bethnal-green, in the county of London, within the district aforesaid, did unlawfully sell an article of food, to wit milk, which was adulterated with 15 per cent. of added water, and was not therefore of the substance and quality demanded by the purchaser, contrary to the statute in such case made and provided. Upon the hearing of the said summons the appellant, through his solicitor, applied for permission to have the samples of the milk taken by the respondent pursuant to the said statute, as well as a sample of milk alleged to have been taken by the appellant's servant, Charles Pittard, as hereinafter mentioned, forwarded to the Commissioners of Inland Revenue, who should thereupon direct the chemical officers of their department, at Somerset House, to make the analyses of the same, and give certificates to the said magistrates of the result of the analyses, and that the expenses thereof should be borne as the magistrate

(a) Reported by MERVYN LL. PEEL, Esq., Barrister-at-Law.

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should direct. Such application was granted, and the said summons was adjourned to the 21st day of August, 1891, and the three samples of milk were in due course forwarded to the Commissioners of Inland Revenue, at Somerset House.

2. At a court of summary jurisdiction, holden at Worship-street Police-court aforesaid, on the 21st day of August, 1891, the said summons came on for hearing, when the magistrate announced the result of the said analyses by the chemical officers at Somerset House, which were as follows :

No. 1. Sample taken by the respondent could not be tested, as the bottle containing the milk was cracked.

No. 2. Sample taken by the respondent was shown to contain not less than thirteen per cent. of added water.

No. 3. Sample of the milk alleged to have been taken by the said Pittard, as hereinafter mentioned, was shown to be free from added water.

Evidence was given that the respondent was an inspector of nuisances for the parish of St. Matthew, Bethnal Green, aforesaid, and on the 4th day of July, 1891, in Shipton-street, in the said parish, there was one of the appellant's milk trucks in charge of his servant, the said Pittard, who was shouting "new milk." The respondent bought half a pint, and paid the said Pittard, and told him that he, the respondent, was an officer, and had bought it for analysis by the public analyst. The respondent gave him one bottle and submitted another bottle to the public analyst, and produced before the magistrate the public analyst's certificate thereof, which certified the presence of 15 per cent. of added water.

Evidence was given by the said Pittard, on behalf of the appellant, that he was in his service, and on the 4th day of July, 1891, before leaving the appellant's premises, he took a bottle of milk from his churn, which he corked and sealed, and placed in the rack on the said premises, pursuant to a printed notice signed by the appellant for the guidance of his servants, which was as follows, that is to say :

Notice.—Each man after receiving his milk to take a sample from his churn, and place same in bottle and rack provided for the purpose. Samples to be taken whilst on round at Mr. Brown's discretion. In event of sample taken on round not agreeing with that left in yard, the carrier will be liable to instant dismissal, or to be proceeded against at Mr. Brown's option. Any man wishing to seal his bottle before leaving the yard can do so with wax and seal provided, or, should he prefer it, with any seal or private mark of his own.

These precautions are taken for the protection of the firm, to find out any dishonest servants who may tamper with the milk.

(Signed) W. BROWN.

The said Pittard further swore that, on his round, he watered the milk, and afterwards served the respondent with the portion of it in question from a hand can. He was not asked and did not say whether he did or did not water the milk with the appellant's sanction, nor for whose profit the watering was done.

The appellant gave evidence on his own behalf, that he had the before-mentioned printed notice posted on his premises, and

that when the said Pittard brought home the sample given him by the respondent, he, the appellant took possession of the same as well as of the sample left by the said Pittard on the appellant's premises before proceeding on his round; that such samples were handed into the said Police-court for analysis by the Commissioners of Inland Revenue, at Somerset House, and that the water put in by the said Pittard, was against his, the appellant's, consent.

It was contended on behalf of the appellant that on this evidence the magistrate ought to find that he did not connive at the adulteration of the milk by the said Pittard, and was therefore not the seller within the meaning of the Act.

3. The magistrate was of opinion, however, that the sale having been effected by the said Pittard as the appellant's agent, the appellant was a seller within the meaning of the Act, and that it was unnecessary to decide whether he connived at the adulteration or not. The magistrate, therefore, ordered him to pay a fine of 20*l.* and 1*l.* 3*s.* costs, but granted him this case.

The question for the High Court was whether the appellant's connivance was necessary to make him liable for the adulteration by the said Pittard. If aye, the case was to be remitted to the magistrate to ascertain the presence or absence of such connivance; if no, the conviction was to be affirmed; or the case otherwise dealt with as the court might direct.

The 38 & 39 Vict. c. 63 (Sale of Food and Drugs Act, 1875), s. 6, provides:

No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser under a penalty not exceeding 20*l.*; provided that an offence shall not be deemed to be committed under this section in the following cases; that is to say:

(1.) Where any matter or ingredient not injurious to health has been added to the food or drug, because the same is required for the production or preparation thereof as an article of commerce, in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight, or measure of the food or drug, or conceal the inferior quality thereof;

(2.) Where the drug or food is a proprietary medicine, or is the subject of a patent in force, and is supplied in the state required by the specification of the patent;

(3.) Where the food or drug is compounded as in this Act mentioned;

(4.) Where the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation.

Moysey for the appellant.—The magistrate was wrong in holding that it was unnecessary to decide whether the appellant connived at the adulteration or not. There was admittedly a dishonest act on the part of the servant, and, if the employer was innocent of all connivance at the adulteration, he cannot be convicted as the seller of the adulterated milk within the meaning of the statute. [WILLS, J.—The question is whether the words “no person shall sell” in sect. 6, mean the actual seller, or whether they mean the person on whose behalf the sale is effected.] Yes, that is, assuming that there was no complicity on the part of the master. [HAWKINS, J.—Complicity on his

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part may be material in considering the question of the fine, but, for the purposes of your argument as to the legal offence, you may assume that he knew nothing about it.] The contention is that sect. 6 only applies to the actual physical seller of the milk.

There are provisions in the statute showing an intention on the part of the Legislature that the person not guilty of complicity, and really innocent, shall escape. Sect. 25, for instance, shows that the person against whom the inspector ought to have proceeded was the servant from whom he bought the milk, and not the employer, and that is emphasised by the case of *Hotchin v. Hindmarsh* (65 L. T. Rep. N. S. 149; (1891) 2 Q. B. 281). Lord Coleridge, C.J. says in his judgment in that case, "In my opinion a person who takes the article in his hand, and performs the physical act of transferring the adulterated thing to the purchaser, is a person who sells within this section."

[WILLS, J.—In that case the servant was convicted, and it shows that the words, "No person shall sell" includes the person physically selling, not that they exclude the master.] This case is governed by its own peculiar circumstances, and if the master has adopted all precautions which a prudent man can take to sell a proper article, then the cases and the statute show that he ought not to be convicted. When the servant sells fraudulently he cannot be said to be his master's agent. [HAWKINS, J.—Can a principal who intrusts the conduct of his business to his agent be absolved from his agent's misconduct in the sale of that which he employs him to sell? The milk was in the possession of the master. If you could show that the servant had stolen the milk the case might be different.] *Newman v. Jones* (17 Q. B. Div. 132) shows that the appellant here ought not to be held responsible for the act of his servant. [HAWKINS, J.—That case is quite different from this. There a man was employed to supply liquor to the members of a club, and he did a thing altogether beyond his employment in selling it to strangers.] Having regard to sects. 5 and 25, it is evident that the framers of the statute intended, where an employer was not in any way attainted by the dishonest act of his servant, or by any knowledge that an improper article was being sold, that he should not be convicted, or in any way suffer punishment under the Act. [HAWKINS, J. referred to *Limpus v. The London General Omnibus Company*, 7 L. T. Rep. N. S. 641; 1 H. & C. 526.]

Beven, for the respondent, in support of the conviction.—The conviction was right. It is immaterial whether the master connived at the offence or not. Proceedings under sect. 6 may be taken either against the master, or against his servant, the actual physical seller of the milk. This case is quite distinct from the two cases cited on behalf of the appellant. In *Newman v. Jones* (*ubi sup.*) the decision was specifically limited to the facts there. If this were a civil case the master clearly would be liable for the act of his servant. *Limpus v. London General Omnibus Company* (*ubi sup.*), and the judgment of Blackburn, J.

in that case, show the principle which is applicable here. The *mens rea* doctrine does not apply to the Sale of Food and Drugs Act. The whole question of the application of that doctrine was discussed by the judges in *Reg. v. Tolson* (60 L. T. Rep. N. S. 899; 23 Q. B. Div. 168). The onus of rebutting the inference of connivance on his part was upon the master, and, as the case stands, he has not rebutted that inference, and for that reason alone, if not for the others, the conviction ought to stand. He also cited the judgment of Bowen, L.J. in *The British Mutual Banking Company Limited v. Charnwood Forest Railway Company* (57 L. T. Rep. N. S. 833; 18 Q. B. Div. 715).

Moysey in reply.

Cur. adv. vult.

Jan. 26.—HAWKINS, J.—I am of opinion that the decision was right, and that the master was properly convicted by the magistrate, subject to one or two observations which I have to make with regard to the amount of the penalty that was inflicted. In the present case there seems to have been before the magistrate no evidence at all that the defendant was himself cognisant that there had been any adulteration of the milk, before the sale of the adulterated milk took place. There seem to have been several rules printed or written, which were stuck about the premises, the object of which was ostensibly that the men who were in his employment should be careful as to the way in which they conducted themselves, so far as regards the purity of the milk. Each man was required or allowed to take out a sample of the milk before he took any of it away for the purpose of being sold abroad; a sample bottle was taken, and the man himself sealed it up, so that there might be no tampering with the milk which was taken from the churns as they came in. On the occasion in question it seems that this was done, and, when the matter came to be investigated, it turned out that the milk which was taken as a sample from the churn and put aside was pure and unadulterated. The man confessed he had adulterated it, and that he had adulterated it to the extent of some 13 to 15 per cent. In this state of things the question arises. Now, I am of opinion, as I have already said, that the conviction ought to be affirmed. I think myself that the master for all purposes must be deemed to be the seller of the milk; that is to say, it is impossible to say that he is not a seller of the milk. It may be said that the person who actually deals with the milk, and sells it, and delivers it for the master, may also within the provisions of this Act of Parliament be the seller of the milk; but at the same time, even if he is so, as I think he is, I think that the master himself is also the seller of the milk. There is no doubt that, civilly, he would be the person alone who would be to blame. For instance, the purchaser of the milk, who is said to be prejudiced by the adulteration, if he had to complain and sue for the injury which he sustained by not having delivered to him that which he had con-

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tracted to have, namely, pure milk, would, as a matter of course, sue the master, and not the servant; and there can be no shadow of doubt, as between the purchaser and the master, that the master would be the person responsible to the purchaser. I do not think that precludes the case, but it would have been a very important factor as to the master or the person who was to be found guilty of an offence of this sort, if it was an essential requisite to his conviction that he was cognisant of the adulteration. I think, however, that it is not necessary at all that the man who sells the milk, that is to say, the principal or seller, is necessarily to be taken to be cognisant of the adulteration, the law making it, I think, an offence if adulterated milk is sold in point of fact, unless, indeed, the person who sells it is able to protect himself from liability to a penalty by reason of the provisions to be found in sect. 25. Looking at the provisions of sect. 6, as far as regards the ordinary sale of milk to a purchaser—the purchaser requiring to have pure milk—if adulterated milk is supplied to him, the seller is liable to a penalty not exceeding 20*l.*; and in my judgment, regardless of the fact whether there was cognisance of it or not. Cognisance of the fact that the milk was adulterated at the time it was sold may be a very material ingredient for the magistrate to take into his consideration when he comes to fix the penalty to be inflicted on the person who sells, but it is not essential to the sufficiency of the proof which is to support the conviction. Sect. 6 does not say, “No person shall knowingly sell to the prejudice of the purchaser any article of food which is not of the nature, substance, and quality demanded.” The word “knowing” seems to have been carefully excluded by the Legislature from this sect. 6, and I can very well understand good reasons for it. A master might in that case protect himself by saying, “Although it is perfectly true my servant sold adulterated milk, and I received the proceeds of the milk which he so sold, yet I am not to be rendered responsible, because you failed to prove I had any cognisance, or that I was conniving at the wrongful act of my servant.” It must have been intended by the Legislature that no difficulty should be imposed upon the purchaser, if in point of fact he bought, as he did in this case, from the milkman himself—I do not mean from the servant, but from the principal, because that is the person he contracts with—and I think it was intended that such person should, under all circumstances, be made responsible. If the appellant’s contention was right, it would admit a whole host of cases in which a man might protect himself from a penalty by throwing difficulties in the way of those who complained of adulteration, by saying that he had no cognisance of the adulteration. I am not without authority for saying this, because in *Betts v. Armstead* (58 L. T. Rep. N. S. 811; 20 Q. B. Div. 771) decided upon this very sect. 6 of this Act, it was held, where bread was sold containing alum, that an offence within this section was committed, although the seller did not know that the article

sold was not of the nature, substance, and quality demanded. The judgment was delivered by my brothers Cave and Smith, and I need not do more than refer to that judgment, because it seems to me that it settles the matter, if that case was rightly decided, beyond the possibility of doubt. That case was followed by another one, *Pain v. Boughtwood* (62 L. T. Rep. N. S. 284; 24 Q. B. Div. 353). No connivance being therefore necessary to establish the offence under this section, is there any reason for saying that the man is not to be responsible for the acts of his servant in the same way that the master is ordinarily responsible for the act of a servant? The magistrate does not put it that it is a criminal act on the part of the master, but the penalty is inflicted, it seems to me, for the purpose of making people exercise care in selling articles which they have no right to adulterate. If what was done was the act of the servant, no one could doubt that the master would be responsible for the act. If he had said, "You may take this milk out, I know it is adulterated;" or "You make take it out, I authorise you to adulterate it," no one could say under such circumstances that, if the servant sold it in its adulterated form, the master would not be liable to be convicted, simply because he was at home or in his shop, and was not with the servant actually selling and delivering the milk. It does not seem to me that connivance would make the smallest difference. It would not have made the agent more or less the agent acting for the appellant, selling the milk taken from the appellant's premises. It strikes me if he had gone with the milk, his master knowing perfectly well he was going to adulterate it, and sell it as adulterated milk, no one would for a moment have contended with anything like a hope of success that the master was not responsible under such circumstances for the act of the person who was acting under his directions. Connivance is immaterial, and the mere actual sale of the milk is that which creates what it is difficult to call an offence, if it is done without anything like a guilty knowledge; but call it an offence for the purpose of defining and expressing what I mean, it is not the less an agency on the part of the man who sold the milk, because, cognisance being immaterial, it is not proved or shown that the master had any knowledge of the fact of the adulteration. I think myself it is very clear that the master is responsible. Some years ago there was a case of *Core v. James* (25 L. T. Rep. N. S. 593; L. Rep. 7 Q. B. 135) decided under 6 & 7 Will. 4, c. 37, s. 8, in which Lush, J. seems to have put it clearly that in his judgment the master would be responsible for the act of his servant under such circumstances as these. Although that case is not quite the same as the one before us, and is under a different Act of Parliament, the principle upon which Lush, J. acted seems to me equally to apply to the present case, and I think it may fairly be treated as an authority in support of the view we have taken of this matter. It has been decided in *Hotchin v. Hindmarsh* (*ubi sup.*) that the actual seller, the ser-

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vant, was certainly responsible. I think not merely the servant, but the master also is responsible, and it cannot be said that the master is not a seller. He clearly is the person with whom the purchaser would be held to contract in the matter of a civil action. It not being necessary to prove there was any connivance or any knowledge of the adulteration, it cannot be that the master can be said to be otherwise than liable as the principal of the servant, even though he were utterly unacquainted with the fact of the adulteration. The milk was sold by his authority; it was sold as milk which he, the master, was delivering through the hands of his agent to the purchaser, and I think he was responsible in the penalty which is imposed on him for the sale of such adulterated milk, and also, I think, legally the servant who actually sold it, but it is not necessary to determine that, for the only question we have to decide is whether or not the master is guilty. I said that the penalty of 20*l.* is an extreme penalty to be paid, but I do not think we have the power to deal at all with the punishment which has been inflicted by the magistrate; nevertheless, the meaning of the latter words of the case may be that the matter may be sent back to him for his consideration with regard to whether or not the penalty should be inflicted to the full extent. As far as I personally am concerned, I should say, if there was no circumstance at all leading to the belief that the appellant, the master, was in any degree cognisant of the adulteration, I do not suppose any magistrate would inflict the full penalty for a first offence. At the same time there may be circumstances of which the magistrate was aware, and of which I am not aware, which might make the magistrate think the full penalty of 20*l.* ought to be inflicted. I say nothing at all as to how he should exercise his judgment, but that being the view I take of the matter, I do think, if he has no knowledge of any previous misconduct on the part of the master, and no reason to suppose he was a party to any adulteration, that it is a fair topic to urge on him in mitigation of the penalty, if he thinks it right to do so.

WILLS, J.—I am of the same opinion. Sect. 6, upon which this question arises, imposes a positive prohibition against the sale of adulterated articles. That implies, to my mind, not only that every person should take care not to do the physical act of selling, but that he should take care that a sale is not effected by persons whom he employs, for the purpose of selling substances that contravene the provisions of the Act of Parliament. That this servant, in the present case, was employed in the general business of selling milk for his master, there cannot be any doubt. If so, I do not see any reason to excuse the master for having broken the Act of Parliament by effecting, through that unfaithful servant, it may be, a sale which was contrary to the Act of Parliament, because he does not sell it himself. He is bound, not only not to sell it himself, but to take care that other people do not sell it for him in such a condition as to come

within sect. 6. If he does not take that care, he breaks the Act of Parliament. Much reliance was placed on the case of *Newman v. Jones* (*ubi sup.*), where it was held that exciseable liquors being sold by a servant contrary to the order of his masters, they were not liable. But, as was pointed out in the course of the argument, that is a totally different case from the present one. There the man who effected the sale was acting outside his orders altogether in selling at all. Here he is acting within his orders in selling, therefore what he does wrongly in the scope of his employment is a matter for which the master is liable, because it is his business to see that, within the scope of the authority which he delegates to the servant, that servant carries out the Act of Parliament just as much as he does himself. There seems to me to be every reason in public policy for giving this construction to the Act of Parliament, and, if more verbal reasons were necessary to supplement it, they exist in abundance, because two of the preceding sections, 3 and 4, impose penalties, and make the breach of the Act of Parliament, after the first offence, a misdemeanour punishable by imprisonment. Those sections are qualified with an express enactment that no person shall be liable to be convicted under those sections if he can show he had no knowledge of the state of things which created the offence, and that he could not by reasonable diligence have obtained that knowledge. Therefore they contain a qualification which is wanting in sect. 6. Moreover, sect. 6 is a substitution for prior enactments which are repealed by this Act of Parliament, and in which the want of knowledge, if established, did constitute an excuse. Those conditions are left out of this Act of Parliament, and they must have been left out purposely—there can be no doubt of that. I think, therefore, that the conviction is perfectly right. I think the learned magistrate meant by the addition which he has made to the second part of his question, to ask whether he ought not to have taken the evidence as to the connivance or want of knowledge of the defendant in that case, for the purpose of inflicting a penalty. It may be, as it stands at present, he thought it immaterial to consider that. I should consider it a very material circumstance to be taken into consideration along with others in apportioning the penalty. It is by no means conclusive, and it may be, although he finds in this particular instance there was no fault on the part of the master in the shape of anything like connivance, he may still think it proper to inflict a penalty, because there may have been circumstances which ought to have put the appellant much more on his guard, and it may be the magistrate may think he has been careless in the choice of his servant, and has not taken proper precautions to see that his servant was likely to carry out his orders, and to act honestly in the matter. It may be, therefore, notwithstanding there was no connivance, the magistrate may think it a case for the full penalty. Clearly, anyone ought to take that factor along with others into consideration, and I

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think it must go back to the learned magistrate with that intimation.

Appeal dismissed. Case remitted to the magistrate to consider whether or not the full penalty should be inflicted.

Solicitor for the appellant, *Holmes Moss.*

Solicitor for the respondent, *R. Voss.*

QUEEN'S BENCH DIVISION.

Tuesday, Jan. 26, 1892.

(Before LAWRENCE and WRIGHT, JJ.)

REG. v. COL. HENLEY AND OTHERS (Justices, &c.) AND HUTCHINS. (a)

Justices—Disqualification of—Bias—Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121) ss. 27, 61.

Under sect. 27, sub-sect. 4, of the Salmon Fishery Act, 1865, the board of conservators of a fishery district have power within their district to do certain things, and among them they have power to take legal proceedings against persons violating the provisions of the Salmon Fishery Acts, 1861 and 1865, and by sect. 61 of the Act of 1865, it is provided for as follows: "No justice of the peace shall be disqualified from hearing any case arising under the Salmon Fishery Acts, 1861, 1865, or either of them, by reason of his being a conservator, or a member of a board of conservators;" and the same section also provides that "no justice shall be entitled to hear any case in respect of any offence committed on his own land."

A justice of the peace was present at a meeting of the board of conservators of which he was a member, and at the meeting the board unanimously passed a resolution to take legal proceedings against a certain person for the violation of certain provisions of the Salmon Fishery Acts. At this meeting of the board of conservators the justice in question was present, but took no further part than by voting for the resolutions directing a prosecution; his name appeared as having been present at the meeting when the resolution was passed authorising the prosecution to be instituted. The justice in question subsequently sat with other

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

justices to hear the charge, and no objection was made to the justice hearing the charge. The justices who tried the case were not riparian owners of the land in question. The justices convicted.

Held, that the conviction must be quashed.

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THIS was a rule *nisi* for a *certiorari* to bring up and quash a conviction of the justices.

The board of conservators of the Axe fishery district was a board established under the Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 27, under which a board of conservators is empowered to appoint water-bailiffs, and by sub-sect. 4 the board is empowered to take legal proceedings against persons violating the provisions of the Salmon Fishery Acts, 1861 and 1865.

In June, 1891, a meeting of the board of conservators took place, at which John Churchill Langdon was present, he being one of the conservators, and also a justice of the peace. At the meeting a resolution was unanimously carried that legal proceedings should be taken against a person named Small and his servants for fishing in violation of certain provisions in the Acts.

Mr. Langdon did not appear to have taken any prominent part at the meeting, and he did not either propose or second any resolution.

The resolution passed at the meeting was put into writing, and was signed by the chairman. The names of all the conservators, including the name of Mr. Langdon, appeared upon the face of the resolution.

An information was then accordingly laid by a water-bailiff in the employ of the conservators, and summonses were granted against Small and eleven of his servants.

On the 13th July these summonses came on for hearing before a bench of magistrates, of whom Mr. Langdon was one, and in the result Small was fined ten shillings, and the summonses against the servants were dismissed. At the time of the hearing of the summonses no objection was taken to the presence of Mr. Langdon upon the bench, although, in order to prove the authority of the water-bailiff to institute the proceedings, the resolution of the board of conservators was bound to be put in, and was put in, and the name of Mr. Langdon appearing thereon might have been seen by the defendant or his solicitor.

Sect. 61 of the Salmon Fishery Act, 1865, says as follows :

No justice of the peace shall be disqualified from hearing any case arising under the Salmon Fishery Acts, 1861, 1865, or either of them, by reason of his being a conservator, or a member of a board of conservators, or a subscriber to any society for the protection of salmon or trout. Provided, that no justice shall be entitled to hear any case in respect of an offence committed on his own land.

The alleged offence was not committed on Mr. Langdon's own land.

W. Howland Roberts, for the justices, showing cause against the rule for a *certiorari*.—Sect. 61 expressly removes a disqualifi-

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cation that might otherwise have existed, and therefore the justice was not disqualified from acting. In order to disqualify there must be a likelihood of a real substantial bias: (*Reg. v. Handsley*, 8 Q. B. Div. 383.) If Mr. Langdon was improperly present at the hearing, there was no objection taken at the time to his being on the bench; it must be assumed that the defendant, or his solicitor, knew of the objection, and therefore there was consent to the jurisdiction: (*Reg. v. Justices of Surrey*, 8 Cox C. C. 314.) The case of *Reg. v. Lee and others* (9 Q. B. Div. 394) is the strongest case against me. In that case sect. 258 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), which enacts that "no justice of the peace shall be deemed incapable of acting in cases arising under the Act by reason of his being a member of any local authority," was held not to operate to remove the disqualification attaching to a justice of the peace in having directed a prosecution; but that case is distinguishable from the present, for sect. 61 of the Salmon Fishery Act is much fuller and more general in its language than sect. 258 of the Public Health Act, in question in *Reg. v. Lee and others*. Under the Public Health Act any person aggrieved may prosecute, but under the Salmon Fishery Act the board of conservators is the only possible prosecutor, the specific authority of the board of conservators being required in each case.

C. W. Mathews for the board of conservators.

Crump, Q.C. and *Hextall*, supporting the rule, were not called upon, but referred to *Reg. v. Milledge* (40 L. T. Rep. N. S. 748; 4 Q. B. Div. 332; 48 L. J. 136, M. C.); *Reg. v. Gaisford* (66 L. T. Rep. N. S. 24; (1892) 1 Q. B. 381).

LAWRANCE, J.—I am of opinion that this rule must be made absolute. The question is whether a justice of the peace, who is a member of the board of conservators, and is present when the resolution for the prosecution of the defendant is passed, and who voted for that resolution, is disqualified from sitting as a justice of the peace upon the hearing of the summons. The cases are very clear and strong as to the principle which ought to guide persons acting as justices, and they show most clearly that, if there is any danger of a substantial bias likely even unconsciously to influence a justice, he ought not to sit, and I cannot do better than make use of the words in the very clear language of Mellor, J. in *Reg. v. Allan* (4 B. & S. 915; 33 L. J. 98, M.C.). He says as follows: "It is exceedingly desirable that justice should be administered by persons who could not be suspected of any, even indirectly, interested motive." No one can suppose that in the present case the justice was really influenced by any interested motive, direct or indirect; he believed himself to be amply justified in the course he took by the provisions of sect. 61. I am clearly of opinion that that section does not operate to remove his disqualification; all it does is to provide that a justice shall not be disqualified from acting as a justice merely by reason of the fact that he is a member of a board of conservators;

it does not authorise him to take part as a member of the board in directing a prosecution to be instituted against a particular individual, and afterwards to act as a justice of the peace and hear and determine the very prosecution that he (with others) has already ordered to be instituted.

WRIGHT, J.—I am of the same opinion. The case of *Reg. v. Lee and others* (9 Q. B. Div. 394) is absolutely in point. As to what amounts to a waiver of the objection or acquiescence in the jurisdiction I express no opinion; the affidavits would seem to show that the objection was not known at the time to the defendant or his solicitor.

Solicitors for the applicant, *Ford and Ford*, for *Wansborough* and *Robinson*, Bristol.

Solicitor for the justices and for the conservators, *Tweed*, Honiton.

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28 & 29 Vict.
c. 121, ss. 27,
61.*

Rule made absolute.

QUEEN'S BENCH DIVISION.

Monday, Feb. 15, 1892.

(Before LAWRENCE and WRIGHT, JJ.)

REG. v. THE JUSTICES OF ESSEX; *Ex parte* STARK. (a)

*Justices—Practice—Appeal to quarter sessions against conviction
—Notice of appeal addressed to clerk of justices—Summary
Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31, sub-sect. 2.*

A rule nisi for a mandamus was obtained calling upon the magistrates at quarter sessions to hear an appeal against a conviction. The magistrates at quarter sessions having refused to hear the appeal because the notice of appeal was addressed to the clerk of the court of summary jurisdiction, and not to the justices from whose decision the appeal was brought:

Held, that the notice was sufficient, and need not be addressed to the justices from whose decision the appeal was brought.

A RULE nisi for a mandamus was obtained calling upon the justices of the peace for the county of Essex to show cause why a writ of mandamus should not issue directing them to hear an appeal brought by William Stark at their next Court of Quarter Sessions, against the conviction of the said William

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

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Appeal from
Court of
Summary
Jurisdiction
—Notice of
appeal to
quarter
sessions—
Sufficiency of
notice ad-
dressed to
clerk of jus-
tices—Sum-
mary Juris-
diction Act,
1879—
42 & 43 Vict.
c. 49, s. 31 (2).*

Stark for assault by a court of summary jurisdiction for one of the divisions of the county of Essex.

The Court of Quarter Sessions refused to hear the appeal because the notice of appeal was not addressed to the justices from whose decision the appeal was brought. The notice of appeal was addressed to, and had been served upon, the clerk of the court of summary jurisdiction on the day on which the decision had been given. The magistrates of the Court of Quarter Sessions considered that the notice addressed only to the clerk of the court of summary jurisdiction was not sufficient.

The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31, sub-sect. 2, says as follows:

Where any person is authorised by this Act, or by any future Act, to appeal from the conviction or order of a court of summary jurisdiction to a court of general or quarter sessions, he may appeal to such court, subject to the conditions and regulations following; (2) The appellant shall, within the prescribed time, or if no time is prescribed within seven days after the day on which the said decision of the court was given, give notice of appeal by serving on the other party, and on the clerk of the said court of summary jurisdiction notice in writing of his intention to appeal, and of the general grounds of such appeal.

Wedderburn showed cause.—The magistrates sitting at quarter sessions had no jurisdiction to hear the appeal. It is necessary that the statutory notices should be addressed to the convicting magistrates, and not to the clerk of the court of summary jurisdiction only. The magistrates of the court of summary jurisdiction are entitled to know that their decision has been appealed from, so that, if they wish, they may have an opportunity of attending the Court of Quarter Sessions: [*Curtis* (app.) v. *Buss* (resp.), 37 L. T. Rep. N. S. 533; 3 Q. B. Div. 13.]

Wightman Wood, in support of the rule, was not called upon.

WRIGHT, J.—If we put a construction upon sect. 31, sub-sect. 2, of the Summary Jurisdiction Act, 1879, that a notice of appeal served upon the clerk of the court of summary jurisdiction was not notice to the justices of the court of summary jurisdiction, we should be putting too narrow a construction on the statutory direction that a notice of appeal is to be served upon the clerk of the court of summary jurisdiction. I have always thought that the object of the Legislature was to lessen as much as possible the number of steps in matters of procedure, and thereby lessen, if possible, expenses. It has been found difficult for an appellant to serve notices of appeal upon all the convicting magistrates, and it was therefore no doubt deliberately enacted that it should be sufficient for him to serve such notice of appeal upon the clerk to the justices, leaving it to the clerk to give notice to the justices who had convicted the appellant, the names of such justices being easy for the clerk to find in the minutes of the proceedings. The rule must therefore be made absolute.

LAWRANCE, J. concurred.

Solicitors: in support of the rule, *Wontner and Sons*; against the rule, *Wilson and Sons*.

QUEEN'S BENCH DIVISION.

Monday, Feb. 15, 1892.

(Before LAWRENCE and WRIGHT, JJ.)

REG. v. SIR WM. PINK AND OTHERS (Justices of Portsmouth). (a)

Vaccination—Justices—Repeated fines—Previous conviction—Fresh order of justices necessary each time—Vaccination Act, 1867 (30 & 31 Vict. c. 84), ss. 29, 31—Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 11.

A question was raised under the Vaccination Act, 1867 (30 & 31 Vict. c. 84) as to whether repeated fines can be imposed on a person for continued disobedience to an order to vaccinate a child. Sect. 31 of the Vaccination Act, 1867, provides as follows: "If the information be given to a justice that a child under the age of fourteen years has not been successfully vaccinated, and that notice has been given to the parent of such child to procure its being vaccinated, and this notice has been disregarded, the justice may summon such parent to appear with the child before him, and if the justice shall find upon examination that the child has not been vaccinated, he may, if he thinks fit, make an order directing the child to be vaccinated within a certain time; and if at the expiration of such time the child shall not have been vaccinated, the person upon whom such order shall have been made shall be proceeded against summarily, and, unless he can show some reasonable ground for his omission to carry the order into effect, shall be liable to a penalty, &c."

Held, that after conviction it is necessary to obtain another order for the vaccination of the child, before the parent can be again fined for disobedience.

A RULE calling upon certain justices of the peace for the borough of Portsmouth to show cause why a writ of *certiorari* should not issue to quash a conviction by them of a certain person for non-complying with an order of a court of summary jurisdiction for the said borough, calling upon him to vaccinate his child in accordance with sect. 31 of the Vaccination Act, 1867, on the ground that the person in question had already been previously convicted by the magistrates of disobedience to the same order.

On the 3rd day of December, 1890, the defendant was convicted of neglecting to take the child to be vaccinated pursuant to sect. 29 of the Vaccination Act of 1867, and he was fined on

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

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—Necessity
for fresh order
—30 & 31
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ss. 29, 31;
34 & 35 Vict.
c. 98, s. 11.*

the 9th day of February, 1891. The vaccination officer gave the defendant notice of his intention to take proceedings under sect. 31. This notice having been disregarded, the vaccination officer laid the information against the father of the child under sect. 31.

On the 24th day of March an order was made by the justices that the child be vaccinated within fourteen days. The defendant did not comply with this order.

On the 21st day of April a summons was issued against the defendant.

On the 28th day of April the defendant was fined twenty shillings, and this amount was recovered under a distress-warrant.

On the 28th day of July a further fine of twenty shillings was inflicted by the justices for the non-compliance with the order of the 24th day of March. No fresh order had been made. The guardians of the union gave special directions to the vaccination officer to take further proceedings against the defendant for disobedience to the order of the 24th day of March, and on his information the defendant was sentenced to pay the above-mentioned fine of twenty shillings, which was recovered in the same manner as the previous fine.

The following are the provisions of the Vaccination Act, 1867 (30 & 31 Vict. c. 84) :

Sect. 29 provides as follows :

Every parent or person having the custody of a child who shall neglect to take such child or cause it to be taken to be vaccinated, or, after vaccination, to be inspected, according to the provisions of this Act, and shall not render a reasonable excuse for his neglect, shall be guilty of an offence and be liable to be proceeded against summarily, and upon conviction to pay a penalty not exceeding twenty shillings.

Sect. 31. If any registrar or any officer appointed by the guardians to enforce the provisions of this Act shall give information in writing to a justice of the peace that he has reason to believe that any child under the age of fourteen years, being within the union or parish for which the informant acts, has not been successfully vaccinated, and that he has given notice to the parent or person having the custody of such child to procure its being vaccinated, and that this notice has been disregarded, the justice may summon such parent or person to appear with the child at a certain time and place, and upon the appearance, if the justice shall find, after such examination as he shall deem necessary, that the child has not been vaccinated, nor has already had the small pox, he may, if he see fit, make an order under his hand and seal directing such child to be vaccinated within a certain time; and if at the expiration of such time the child shall not have been so vaccinated, or shall not be shown to be then unfit to be vaccinated, or to be insusceptible to vaccination, the person upon whom such order shall have been made shall be proceeded against summarily, and, unless he can show some reasonable ground for his omission to carry the order into effect, shall be liable to a penalty not exceeding twenty shillings.

Sect. 11 of the Vaccination Act 1871 (34 & 35 Vict. c. 98) enacts as follows :

Any complaint may be made and any information laid for an offence under the Vaccination Acts, 1867 and 1871, at any time not exceeding twelve months from the time when the matter of such complaint or information arose, and not subsequently.

Macmorran showed cause.—The effect of sect. 31 of the Vaccination Act, 1867, and sect. 11 of the Act of 1871, is to

render disobedience to an order for the vaccination of a child a continuing offence from day to day throughout the duration of the prescribed period; the justices had therefore power to fine the defendant again under the order of the 24th day of March; such order had not been exhausted by the first fine. The notice holds good for twelve months. A parent might be summoned from day to day. *Allen v. Worthy* (21 L. T. Rep. N. S. 665; L. Rep. 5 Q. B. 163; 39 L. J. 36, M. C.) and *Pilcher v. Stafford* (9 L. T. Rep. N. S. 759; 33 L. J. 113, M. C.; 4 B. & S. 775) were cases decided under the older Act. The offence is disobedience of the order. *Knight v. Halliwell* (30 L. T. Rep. N. S. 359; L. Rep. 9 Q. B. 412; 43 L. J. 113, M. C. and 137 Q. B.), decided since the Vaccination Act, 1874, held that the information having been laid at a time exceeding twelve months from the complaint (that is, the giving of the notice) a fresh notice was required. If this notice, therefore, to the offender against the Vaccination Acts is by virtue of sect. 11 of the later Act of 1871 good for twelve months from the time when it is given, why should not the order which is founded upon the notice be good for the same period?

E. U. Bullen and Bonner were not called upon in support of the rule.

LAWRANCE, J.—I am of opinion that this conviction should be quashed. It is quite clear, under sect. 31 of the Vaccination Act 1864, that more than one penalty may be recovered. The question now before us is, as to the necessity for a second order when it is sought to recover a second penalty. In the older case of *Allen v. Worthy* (*ubi sup.*), a second order had been obtained, and the point was therefore in that case not raised. I think, however, that in this case a second order is necessary; otherwise a man might be proceeded against under the section for a whole year without a fresh order—a construction for which I know of no authority.

WRIGHT, J.—I am of the same opinion. There must be a fresh order. There is nothing that I can see, in reading the section, which makes the disobedience to an order for the vaccination of the child a continuing offence, and therefore this case falls within the principle of *Crepps v. Burden* (Smith's Leading Cases, 8th edit., 711), in which it was decided that a person is not to be proceeded against twice for what is substantially the same offence. There must be a second application to the justices, that they may have an opportunity of exercising their discretion as to making this second order.

Solicitors for the justices, *Rowcliffes, Rawle, and Co.* for *Addison*, Portsmouth.

Solicitor in support of the rule, *A. W. Mills* for *J. Feltham*, Portsmouth.

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QUEEN'S BENCH DIVISION.

Tuesday, Feb. 16, 1892.

(Before LAWRENCE and WRIGHT, JJ.)

REG. v. JUSTICES OF LONDON; *Ex parte* LAMBERT. (a)

Justices—Practice—Summary Jurisdiction—Summary trial of adult with consent—Conviction—Appeal to quarter sessions—Right of convicted person to appeal—Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), ss. 12, 19.

Where an adult person, who is charged before a court of summary jurisdiction with an indictable offence, consents to be dealt with summarily under sect. 12 of the Summary Jurisdiction Act, 1879, and is so dealt with and convicted, then such person has no right of appeal, under sect. 19 of the Act, to a court of quarter sessions, inasmuch as sect. 19 only gives a right of appeal in case of a conviction "in pursuance of any Act, whether past or future," which does not include a conviction under this Act itself.

RULE for a *mandamus* calling upon the justices of the county of London in quarter sessions to show cause why they should not hear and determine the appeal of the applicant from a conviction for larceny by a metropolitan police magistrate. The rule was granted at the instance of the applicant, George Lambert.

George Lambert, who was an adult, was charged before a metropolitan police magistrate with larceny of a sum of twenty-two shillings, and, on being asked whether he desired to be tried by a jury, or would consent to the case being dealt with summarily, he consented to be dealt with summarily, in pursuance of the provisions of sect. 12 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49).

The applicant was thereupon dealt with summarily, and was convicted by the magistrate, and sentenced to three months' imprisonment.

The applicant appealed from this conviction to quarter sessions when the objection was taken against him that there was no right of appeal from a summary conviction under sect. 17 of the Summary Jurisdiction Act, 1879.

This objection was upheld by the court, who refused to hear the appeal, and the applicant then obtained the present rule.

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49) provides :

Sect. 12. Where a person who is an adult is charged before a court of summary jurisdiction with any indictable offence specified in the second column of the first schedule to this Act, the court, if they think it expedient so to do, having regard to the character and antecedents of the person charged, the nature of the offence, and all the circumstances of the case, and if the person charged with the offence, when informed by the court of his right to be tried by a jury, consents to be dealt with summarily, may deal summarily with the offence, and adjudge such person, if found guilty of the offence, to be imprisoned, with or without hard labour, for any term not exceeding three months, or to pay a fine not exceeding twenty pounds.

For the purpose of a proceeding under this section, the court at any time during the hearing of the case at which they become satisfied by the evidence that it is expedient to deal with the case summarily, shall cause the charge to be reduced into writing and read to the person charged, and then address a question to him to the following effect : "Do you desire to be tried by a jury, or do you consent to the case being dealt with summarily?" with a statement, if the court think such statement desirable for the information of the person to whom the question is addressed, of the meaning of the case being dealt with summarily, and of the assizes or sessions (as the case may be) at which he will be tried if tried by a jury.

Sect. 18. Where, in pursuance of any Act, whether past or future, any person is adjudged by a conviction or order of a court of summary jurisdiction to be imprisoned without the option of a fine, either as a punishment for an offence, or, save as hereinafter mentioned, for failing to do, or to abstain from doing, any act or thing required to be done or left undone, and such person is not otherwise authorised to appeal to a court of general or quarter sessions, and did not plead guilty or admit the truth of the information or complaint, he may, notwithstanding anything in the said Act, appeal to a court of general or quarter sessions against such conviction or order.

Provided that this section shall not apply where the imprisonment is adjudged for failure to comply with an order for the payment of money, for the finding of sureties, for the entering into any recognisance, or for the giving of any security.

Sect. 49. In this Act, if not inconsistent with the context, the following expressions have the meanings hereinafter respectively assigned to them, that is to say : The expression "past Act" means any Act passed before the commencement of this Act, exclusive of this Act. The expression "future Act" means any Act passed after the commencement of this Act.

Macmorran, for the justices, showed cause.—When a person has been convicted under sect. 12 of the Summary Jurisdiction Act there is no right of appeal under sect. 19 of the Act. This clearly appears from the provisions of the Act. Sect. 19 says that there shall be an appeal where there is a conviction "in pursuance of any Act, whether past or future." Here there was no conviction under "any Act, whether past or future," for the conviction was in pursuance of the Summary Jurisdiction Act itself, and not in pursuance of any other Act. As we see by the Interpretation clause, this Act of 1879 carefully distinguishes between "past Acts," "future Acts" and "this Act," and the Act always mentions this Act when it is intended to include it. We see this also in various sections, as for instance, sect. 5 speaks of a court of summary jurisdiction under "this Act," or "under any other Act, whether past or future;" sect. 20 speaks of a case arising under this Act, or under any other Act, whether past or future; sect. 31, speaks of a person authorised by "this Act" or by any "future Act," and sect. 49 defines "past Act" to mean any Act passed before the commencement of this Act, exclusive of this Act, and "future Act" is defined to be any Act passed

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after the commencement of this Act. From these instances it is clear that when the intention is to include this Act, the Act expressly includes it, and by sect. 19 the right of appeal is only given in case of a conviction under any past or future Act, which therefore does not include a conviction under the present Act.

Moses in support of the rule.—Sect. 19 was intended to give a larger power of appeal than formerly existed, and that section is wide enough to include a conviction under sect. 12 of the Act for the section gives a right of appeal where the conviction is in pursuance of "any Act." If the Legislature had intended to limit the right of appeal as contended for, and to exclude appeals from convictions under sect. 12, then it would have been easy to say so, but it has not done so. Moreover, sect. 19 expressly excepts from the right of appeal the cases where a person pleads guilty, or admits the truth of the information or complaint. This shows that when the Legislature intended to create exemptions from the right to appeal under sect. 15, they have expressly stated those exemptions. But they have stated no such exemption with regard to a summary conviction under sect. 12, so that where there is a conviction under that section there is a right of appeal under sect. 19.

LAWRANCE, J.—I am of opinion that this rule should be discharged, as I have come to the conclusion that in this case there was no right of appeal to the quarter sessions. I think that the result of the 12th section of the Summary Jurisdiction Act, 1879, is that the person who is charged under that section, and consents to be dealt with summarily, makes a bargain with the magistrate that he will leave the decision of the case to him, instead of having the case tried by a jury. It has been argued that it is a great hardship for the defendant if he cannot appeal, as he does not know at the time of giving his consent what it is he is consenting to. But this is obviated when we remember that, under sect. 12, it is the duty of the magistrate to cause the charge to be read over to the defendant, and to ask him if he "desires to be tried by a jury," or if he "consents to the case being dealt with summarily," and then the section says that the magistrate is to explain the meaning of the case being dealt with summarily. I have no doubt all this was done in the present case. Then there arises the question whether there is, under the 19th section of the Act, an appeal to quarter sessions when the accused person has consented to be dealt with summarily under sect. 12. The words of sect. 19 are these. [Reads it.] If it had been intended, by this sect. 19, to give a right of appeal against convictions under sect. 12, the Legislature could have easily said so; but it has said the contrary, as sect. 19 expressly purports to give the right of appeal only in cases arising under other Acts, past or future, where already there was no appeal. It seems to me that the words "past or future Acts" in that section show that the intention was to give a right of appeal only where past or future Acts did not give that right, and I

see nothing in this Act of 1879 which would show an intention to give a right of appeal when the defendant has been dealt with summarily under sect. 12. But then it has been argued that such an intention does appear, because at the end of sect. 19, the cases where the defendant pleads guilty, or admits the truth of the information or complaint, are expressly excepted from the right of appeal, whereas cases where a person consents to be dealt with summarily are not expressly excepted. I think, however, that those exceptions refer to the previous words "in pursuance of any Act, whether past or future," and I am of opinion that these words "in pursuance of any Act, whether past or future" were advisedly used to prevent sect. 19 applying to convictions under sect. 12. This view is strengthened when we look at sect. 20, which uses the words "a case arising under this Act, or any other Act, whether past or future," and at sect. 31, which says "where any person is authorised by this Act or by any future Act," and at sect. 32, which says, "where a person is authorised by any past Act." These sections all show that the Legislature distinguishes in this Act between "this Act," "past Acts," and "future Acts," and that when it intends any provision to apply to this Act, it expressly says so.

WRIGHT, J.—I am of the same opinion. For many years before 1879, Courts of summary jurisdiction have had the power to deal with juvenile offenders for indictable offences, and, with consent, to convict them and sentence them to a less punishment than if they had been indicted; and, so far as I am aware, there has never been any case in which there has been an appeal from a conviction under such summary jurisdiction. That fact is material to the consideration of this Summary Jurisdiction Act, 1879, which extended that power of summary conviction to cases where adults were charged. The Legislature, in 1879, seems to have deliberately intended to continue the same procedure as had hitherto been adopted in the case of juvenile offenders, and to have deliberately chosen expressions which would have the effect of excluding the right of appeal to quarter sessions in cases where the power of summary conviction was given when the defendant consented to be dealt with summarily. Moreover, the Summary Jurisdiction Acts have, since 1879, been at least once under review, and no intention on the part of the Legislature has been shown of giving a right of appeal in these cases. The practice for many years has been that in such cases there is no appeal, and that practice must have some weight. I think, therefore, in this case that there is no right of appeal, and that this rule must be discharged.

Rule discharged.

Solicitors for the defendant, *E. Farman.*

Solicitor for the justices, *The Solicitor to the Treasury.*

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QUEEN'S BENCH DIVISION.

Monday, April 4, 1892.

(Before SMITH and LAWRENCE, JJ.)

REG. v. NEWTON. (a)

Justices' jurisdiction — Disorderly houses — Summary proceedings—Warrant for arrest of person accused—25 Geo. 2, c. 36, ss. 5, 6, and 7—58 Geo. 3, c. 70, s. 7—Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 2—Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 13.

The provisions contained in sects. 5 & 6 of the Act of 25 Geo. 2, c. 36, which provide that a warrant shall be issued for the arrest of a person accused, on notice given by two inhabitants to a constable, of keeping a disorderly house, apply to a prosecution by summary proceedings, under sect. 13 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), of a person accused of keeping a brothel; and, therefore, in such a case, if an application for a warrant is made in accordance with 52 Geo. 2, c. 36, a magistrate is bound to grant it.

A RULE nisi for a mandamus calling upon Mr. Newton, one of the metropolitan police magistrates, to show cause why he should not make out his warrant to apprehend and bring before him certain persons who were accused of keeping a brothel, was obtained under the following circumstances:—

The application for a warrant had been made in accordance with the provisions of 25 Geo. 2, c. 36, ss. 5, 6, and 7, on notice in writing, given by two inhabitants to a constable. The magistrate was of the opinion that the provisions of 25 Geo. 2, c. 36, as to the granting of warrants, did not apply to the case of summary proceedings for the suppression of brothels under sect. 13 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), and that in such a case when a warrant is applied for, the application ought to be made on an information laid before the magistrate under sect. 2 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), and he refused to grant a warrant.

Sect. 5 of 25 Geo. 2, c. 36, enacts as follows:

In order to encourage prosecutions against persons keeping bawdy-houses, gaming-houses and other disorderly houses, be it enacted, that if any two inhabitants of any parish or place, paying scot and bearing lot therein, do give notice in writing to any constable (or other peace officer of the like nature when there is no constable) of such

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

parish or place, of any person keeping a bawdy-house, gaming-house, or any other disorderly house, in such parish or place, the constable or such officer as aforesaid so receiving such notice shall forthwith go with such inhabitants to one of His Majesty's justices of the peace of the county, city, riding, division, or liberty in which such parish or place does lie, and shall upon such inhabitants making oath before such justice that they do believe the contents of such notice to be true, and entering into a recognisance in the penal sum of twenty pounds each to give and produce material evidence against such person for such offence, enter into a recognisance in the penal sum of thirty pounds to prosecute with effect such person for such offence, at the next general or quarter sessions of the peace, or at the next assizes to be holden for the county in which such parish or place does lie, as to the said justices shall seem meet. . . . And in case such person shall be convicted of such offence, the overseers of the poor of such parish or place shall forthwith pay the sum of ten pounds to each of such inhabitants. . . .

Sect. 6. Provided always, that upon such constable or other officer entering into such recognisance to prosecute as aforesaid, the said justice of the peace shall forthwith make out his warrant to bring the person so accused of keeping a bawdy-house, gaming-house, or other disorderly house, before him and shall bind him or her over to appear at such general or quarter sessions or assizes, there to answer such bill of indictment as shall be found against him or her for such offence.

Sect. 7. Provided also that in case such constable shall neglect or refuse, upon such notice, to go before any justice of the peace or to enter into such recognisance, or shall be wilfully negligent in carrying on the said prosecution, he shall for every such offence forfeit the sum of twenty pounds to each of such inhabitants so giving notice as aforesaid.

58 Geo. 3, c. 70, s. 7, enacts, after reciting a portion of the provisions of the Act 25 Geo. 2, c. 36, s. 5:

That a copy of the notice which shall be given to such constable, shall also be served on or left at the places of abode of the overseers of the poor of such parish or place, or one of them, and such overseers or overseer of the poor shall be summoned or have reasonable notice to attend before such justice of the peace before whom such constable shall have notice to attend; and if such overseers or overseer of the poor shall then and there enter into such recognisance to prosecute such offender as the constable is in and by the said Act required to enter into, then it shall not be necessary for, nor shall such constable be required to enter into such recognisance; but if such overseers or overseer of the poor shall neglect to attend such justice on having such notice, or shall attend, and shall decline or refuse to enter into such recognisance to prosecute, then such constable shall enter into the same, and shall prosecute, and shall be entitled to his expenses, to be allowed as in and by the said Act is directed.

Sect. 2 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43, commonly known as Jervis' Act) enacts that upon information being laid before a justice for an offence.

The justice or justices before whom such information shall have been laid, may, if he or they shall think fit, upon oath or affirmation being made before him or them, substantiating the matter of such information to his or their satisfaction . . . issue, in the first instance, his or their warrant for apprehending the person against whom such information shall have been so laid, and bringing him before the same justice or justices, or before some other justice or justices of the peace . . . to answer to the said information, and to be further dealt with according to law.

By sect. 54 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49):

This Act shall be construed as one with the Summary Jurisdiction Act, 1848, so far as is consistent with the tenour of such Acts respectively.

Sect. 13 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69) enacts as follows:

Any person who (1) keeps or manages or acts or assists in the management of a brothel, or (2) being the tenant, lessee, or occupier of any premises, knowingly permits such premises or any part thereof to be used as a brothel or for the purposes

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of habitual prostitution, or (8) being the lessor or landlord of any premises, or the agent of such lessor or landlord, lets the same or any part thereof with the knowledge that such premises or some part thereof are or is to be used as a brothel, or is wilfully a party to the continued use of such premises or any part thereof as a brothel, shall on summary conviction in manner provided by the Summary Jurisdiction Acts be liable (1) to a penalty not exceeding twenty pounds or, in the discretion of the court, to imprisonment for any term not exceeding three months, with or without hard labour, and (2) on a second or subsequent conviction to a penalty not exceeding forty pounds or, in the discretion of the court, to imprisonment for any term not exceeding four months, with or without hard labour; and in the case of a third or subsequent conviction such person may, in addition to such penalty or imprisonment as last aforesaid, be required by the court to enter into a recognisance, with or without sureties, as to the court seems meet, to be of good behaviour for any period not exceeding twelve months, and in default of entering into such recognisance, with or without sureties (as the case may be), such person may be imprisoned for any period not exceeding three months, in addition to any term of imprisonment as aforesaid. Any person on being summarily convicted in pursuance of this section may appeal to the court of general or quarter sessions against such conviction. The enactments for encouraging prosecutions of disorderly houses contained in sects. 5, 6, and 7 of 25 Geo. 2, c. 36, as amended by sect. 7 of 58 Geo. 3, c. 70, shall, with the necessary modifications, be deemed to apply to prosecutions under this section and the said enactments shall for the purposes of this section be construed as if the prosecution in such enactments mentioned included summary proceedings under this section as well as a prosecution on indictment.

The *Solicitor-General* and *Daddy*, for the magistrate, showed cause.—The learned magistrate was right in refusing to issue a warrant. Sect. 6 of 25 Geo. 2, c. 36, directs the issue of a warrant; but that provision refers only to prosecutions by indictment. Sect. 13 of the Criminal Law Amendment Act, 1885, gives a remedy by summary proceedings, and enacts that sects. 5, 6, and 7 of 25 Geo. 2, c. 36, as amended by sect. 7 of 58 Geo. 3, c. 70, shall apply to prosecutions under sect. 13 of the Criminal Law Amendment Act with “necessary modifications;” and one of the necessary modifications is that, in the case of proceedings under the Summary Jurisdiction Acts, the right to a warrant, given by 25 Geo. 2, c. 36, s. 6, in the case of prosecutions by indictment, is excluded, for all the provisions of the Summary Jurisdiction Acts are applicable, and therefore, under 11 & 12 Vict. c. 43, s. 2, before a warrant is granted an information must first be laid before a magistrate. A warrant may be necessary to compel the attendance of an accused person where the prosecution is to be by indictment, but it is not necessary in the case of summary proceedings, for then, if a person summoned fail to appear, the magistrate may proceed to hear the charge *ex parte*, as provided for in the latter part of sect. 2 of Jervis’ Act.

Avory, in support of the rule.—By the Criminal Law Amendment Act, 1885, the remedy by indictment is not taken away; it merely gives a new remedy by summary proceedings. The magistrate is not bound to deal summarily with the case; he may send the case for trial. There is, therefore, no need to draw any distinction between summary proceedings and prosecutions by indictment. The effect of sect. 13 of the Criminal Law Amendment Act, 1885, is that all references to prosecutions in the Acts of 25 Geo. 2, c. 36, and 57 Geo. 3, c. 70, applied by that section must be read now as if the word “prosecution” included sum-

mary proceedings. He cited *Kirwin v. Hines* (54 L. T. Rep. N. S. 610).

SMITH, J.—In this case an order for a rule *nisi* has been granted calling upon Mr. Newton, one of the Metropolitan police magistrates, to show cause why he should not issue his warrant for the apprehension of certain persons who were accused of keeping a brothel. The Solicitor-General, in showing cause on behalf of the magistrate, has taken a point which, on the face of it, is somewhat plausible; but, on reading the whole of sect. 13 of the Criminal Law Amendment Act, 1885, I have come to the conclusion that the case is as plain as it could be. The old Act (25 Geo. 2, c. 36) was passed in order to induce the inhabitants to prosecute keepers of disorderly houses. Sects. 5, 6, and 7 of that Act are intended to provide for the effective conduct of such prosecutions, and to secure payment of the expenses of the prosecutions, and of rewards where convictions are obtained. These sections provide that any two inhabitants may give notice in writing to a constable, of any person keeping a disorderly house, and then go before a magistrate with a constable, and produce the notice which has been given to the constable, and swear that they believe the contents of the notice to be true, and then the magistrate is to issue his warrant for the apprehension of the person accused, and the two inhabitants are to be bound over to produce evidence, and the constable is to be bound over to prosecute. Sect. 7 of the later Act (58 Geo. 3, c. 70) only empowers the overseers on receiving notice to go on with the prosecution if they should think fit, and if they do not, the constable is to prosecute. The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 13, provides that the suppression of brothels may be carried out by means of summary proceedings, but it leaves the old procedure by indictment still available. There is also an appeal given to quarter sessions against any summary conviction under this section. The Solicitor-General contends that because it is proposed to take summary proceedings in the present case, all the procedure which is applicable to summary jurisdiction must apply, and therefore the provisions of Jervis' Act are applicable here. Sect. 2 of Jervis' Act (11 & 12 Vict. c. 43) requires that before the warrant is issued an information shall have been laid before the magistrate, and the matter of such information substantiated by oath or affirmation. If that provision were applicable, it would follow that the magistrate in the present case might decline to grant a warrant until the case was plainly put before him by information. Mr. Avory contends that sect. 13 of the Criminal Law Amendment Act, 1885, only gives a remedy by summary proceedings in addition to the remedy by indictment which already existed, and that the provisions of the Acts of George II. and George III. which apply to the remedy by indictment, are by the Criminal Law Amendment Act, 1885, made applicable also to the remedy by summary proceedings. I am of opinion that the words of sect. 13 of the

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Criminal Law Amendment Act, 1885, bear out that contention. That section applies the provisions of the older Acts, with the necessary modifications, to summary prosecutions, and then goes on to provide as follows: "And the said enactments shall, for the purposes of this section, be construed as if the prosecution in such enactments mentioned included summary proceedings under this section as well as a prosecution on indictment." The effect of these words is to read into sects. 5, 6, and 7 of 25 Geo. 2, c. 36, a reference to proceedings by way of summary prosecution, so as to make the provisions contained in those sections applicable to summary prosecutions as well as to prosecutions by indictment. I am therefore of opinion that the magistrate in this case is bound to issue a warrant, and that the order ought to be made absolute. LAWRENCE, J.—I am entirely of the same opinion. I look upon the last words of sect. 13 of the Criminal Law Amendment Act, 1885, as conclusive.

Order made absolute.

Solicitors for the prosecution, *Ayton, Safford, and Kent.*

Solicitors for the magistrate, *Hare and Co.*, agents for the *Solicitor to the Treasury.*

CROWN CASES RESERVED.

Saturday, May 28, 1892.

(Before Lord COLERIDGE, C.J., POLLOCK, B., HAWKINS, SMITH, and WILLS, JJ.)

REG. v. RUSSETT. (a)

Larceny by trick—Sale of horse—Payment of deposit—Agreement to pay balance of purchase money on delivery of horse—Deposit received with intention not to deliver horse.

In support of an indictment charging a prisoner with the larceny of the sum of 8l. it was proved that he had at a fair agreed to sell to the prosecutor a horse for 23l., that the prosecutor had paid the prisoner the sum of 8l., and had executed an agreement to pay the balance of 15l. upon delivery of the horse. At the time the 8l. was paid the prosecutor never expected its return, but expected to have the horse delivered to him. The horse not

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

having been delivered, however, and the circumstances attending its removal from the fair by the prisoner being such as to satisfy the jury that the prisoner never intended when he received the 8l. to deliver the horse to the prosecutor, the prisoner was found guilty of the larceny of that sum. Upon a case reserved for the consideration of this court :—

Held, that the prosecutor had under the circumstances parted with the possession only of the money and not with the property in it, and that therefore the prisoner had been rightly convicted of its larceny.

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CASE stated for the opinion of the Court by the deputy chairman of the quarter sessions of the county of Gloucester.

The prisoner, George Russett, was tried before me at the Easter Quarter Sessions for the county of Gloucester, on an indictment (a copy of which is annexed) charging him with having on the 26th day of March, 1892, feloniously stolen 8l. from James Brotherton.

COPY INDICTMENT.

Gloucestershire, to wit: The jurors for our Lady the Queen upon their oath present that George Russett on the twenty-sixth day of March in the year of our Lord one thousand eight hundred and ninety-one, at the parish of Winchcomb in the county of Gloucester, feloniously did steal, take and carry away eight pounds in money of the moneys of James Brotherton, against the peace of our said Lady the Queen, her crown and dignity.

The following facts were proved:

1. James Brotherton attended Winchcomb fair on the 26th day of March, where he met the prisoner, who offered to sell to him a horse for 24l. Brotherton subsequently agreed to purchase the horse for 23l., 8l. of which was to be paid down, and the remaining 15l. was to be handed over to the prisoner either as soon as Brotherton was able to obtain the loan of it from some friend in the fair (which he expected to be able to do) or at Brotherton's house at Littlehampton, where the prisoner was told to take the horse to if the balance of 15l. could not be obtained in the fair.

2. James Brotherton, his son, Frank Brotherton, the prisoner, and one or two of his companions, then went into a public-house, where an agreement in the following words was written out by one of the prisoner's companions, and signed by prisoner and James Brotherton:

26th March.—G. Russett sell to Mr. James and Brother brown horse for the sum of 23l. Mr. James and Brothers pay the sum of 8l., leaving balance due 15l. to be paid on delivery.

Signed

GEORGE RUSSETT.

[Stamp]

JAMES BROTHERTON.

3. James Brotherton thereupon paid the prisoner 8l. He

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(James Brotherton) said, in the course of his evidence, "I never expected to see the 8*l.* back, but to have the horse."

4. The prisoner never gave James Brotherton an opportunity of attempting to borrow the 15*l.*, nor did he ever take or send the horse to Brotherton's house, but he caused it to be removed from the fair under circumstances from which the jury inferred that he had never intended to deliver it.

5. It was objected by counsel for the prisoner that there was no evidence to go to the jury on the ground that prosecutor parted absolutely with the 8*l.*, not only with the possession but the property in the same; consequently that the taking by the prisoner was not larceny, but obtaining money by false pretences if it was a crime at all.

6. I overruled the objection, but consented, in the event of a conviction, to take the opinion of the Court of Crown Cases Reserved on the point.

7. In summing up I directed the jury that, if they were satisfied from the facts that the prisoner had never intended to deliver the horse, but had gone through the form of a bargain as a device by which to obtain Brotherton's money, and that Brotherton never would have parted with his 8*l.* had he known what was in the prisoner's mind, they should find the prisoner guilty of larceny.

8. The jury found the prisoner guilty, and I sentenced him to four months' imprisonment with hard labour, but admitted him to bail pending the decision of the Court of Crown Cases Reserved on this case.

9. The question for the Court is, whether or not I was right in leaving the case to the jury.

Gwynne James, on behalf of the prisoner, submitted that the offence of which the prisoner had been found guilty was really the offence of obtaining money by false pretences, in respect of which he ought not to have been convicted upon an indictment for larceny; that the case was not governed by the decision in *Reg. v. Buckmaster* (57 L. T. Rep. N. S. 720; 20 Q. B. Div. 182; 16 Cox C. C. 339), for, in that case, the prosecutor believed that, on a certain event happening, he would receive back the identical money handed by him to the prisoner, whereas here the prosecutor said that he never expected to see the money back. Here the money had passed under a contract, and as a result of a contract. It was true that the facts found amounted, according to *Reg. v. Gordon* (60 L. T. Rep. N. S. 872; 23 Q. B. Div. 354; 16 Cox C. C. 622; 58 L. J. 117, M. C.), to a false pretence, but that would not justify the conviction for larceny. In *Clough v. The London and North-Western Railway Company* (L. Rep. 7 Ex. 26), Mellor, J. said, at p. 34, that the fact that a contract had been induced by fraud did not render the contract void or prevent the property from passing, but merely gave the party defrauded a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or

would disaffirm the contract and resume his property. Here, then, the money which the prisoner was charged with stealing having been handed over by the prosecutor under a contract, the property in it had passed, and the prisoner could not be convicted of having taken and stolen it. In *Reg. v. Harvey* (2 East P. C. 669; 1 Leach. 467), the prisoner bought a horse at a fair, and having mounted the horse, rode off, telling the prosecutor that he would return immediately and pay, to which the prosecutor had answered "Very well." Under these circumstances it was held that there was no larceny, as the property in the horse, as well as the possession, had been parted with. [HAWKINS, J.—The case of *Reg. v. Harvey* was discussed in the case of *Reg. v. Slow* (12 Cox C. C.), and will not assist you. POLLOCK, B.—In *Reg. v. Harvey* there was no finding that the prisoner came to the prosecutor with the intention of stealing his horse.]

Stroud, in support of the conviction, was not called upon to argue.

LORD COLERIDGE, C.J.—I am of opinion that in this case the prisoner was rightly convicted. The principle which governs the question raised by this case has been laid down over and over again; and it is useless to go through a number of cases in which, though the facts are not precisely the same as the facts involved here, the principle which has been applied to such facts has been the same, and in every case it will be found that such principle has been rightly applied and the case perfectly rightly decided. Now, if money or goods have been parted with by the owner, he not intending to part with the property in such money or goods except in a certain event, and part of the transaction is incomplete, possession only of the money or goods having been parted with owing to the fraud of the receiver, then that constitutes larceny by means of a trick, and that is the principle underlying every one of the cases. If we want any authority for that there are two decisions which this court cannot overrule: first, *Reg. v. McKale* (18 L. T. Rep. N. S. 335; L. Rep. 1 C. C. R. 125; 11 Cox C. C. 32; 16 W. R. 800), in which Kelly, C.B., in delivering his judgment, expressed himself thus: "The distinction between fraud and larceny is well established. In order to reduce the taking under such circumstances as in the present case from larceny to fraud, the transaction must be complete. If the transaction is not complete, if the owner has not parted with the property in the thing, and the accused has taken it with a fraudulent intent, that amounts to larceny." That was expressed by a great authority, if I may say so, in the year 1868. And, secondly, there is the decision of this court in the case of *Reg. v. Buckmaster* (*ubi sup.*), a case which seems to me directly in point here, and which was decided upon the same principles as in the previous case. This conviction must therefore be affirmed.

POLLOCK, B.—I agree with the conclusion at which my Lord

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has arrived, and can add nothing to it except that I wish it to be understood that my judgment in no way interferes with the rule of law which has been acted upon for many years, namely, that where there has been no parting with the property by the owner of it, then it is larceny. My mind is therefore directed to asking whether there is any evidence here that the prisoner did intend to part with his property in the horse. The prisoner never intended to contract at all, and the contract was therefore void. It seems to me that this conviction ought to be affirmed.

HAWKINS, J.—I am entirely of the same opinion. When the prosecutor gave the money by way of deposit to remain in the prisoner's hands until the delivery of the horse, it never could have been intended that the prisoner should keep the money whether the horse was given or not. The prisoner knew perfectly well when he took the money that the contract never would be completed, and I confess that I cannot see why this case is not governed by the principle laid down in a variety of cases. I cannot get my mind to entertain a shadow of a doubt that the prisoner was rightly convicted of larceny.

SMITH, J.—The question here is, whether the prisoner ought to be convicted of larceny or of false pretences. The difference between them is that, if possession only and not the entire property was intended to be passed, then an indictment for felony can be sustained. While, if it was intended that the property should pass, it cannot be larceny or larceny by trick because there was no taking. The last line of the contract here is: "Messrs. James and Brothers pay the sum of 8*l.* leaving balance due 15*l.* to be paid on delivery." Now what does that mean? It is said that it means that the prosecutor was to pay 8*l.* whether the horse was delivered or not. I cannot read it so, and therefore the conviction must, in my opinion, be affirmed.

WILLS, J.—I am of the same opinion. As far as the prisoner was concerned, it seems to me that the intended contract must be put out of the question; it was a pure sham on his part. If so, the doctrine that the property was obtained in consequence of a contract, and that the offence must therefore be reduced to false pretences, cannot possibly be applied; and I am therefore of opinion that this conviction must be affirmed.

Conviction affirmed.

Solicitors for the prosecution, *Indermaur and Brown*, for *Smith*, of *Winchcomb*.

Solicitor for the prisoner, *H. Lewis*, of *Cheltenham*.

QUEEN'S BENCH DIVISION.

Wednesday, May 4, 1892.

(Before POLLOCK, B., and WILLIAMS, J.)

HAMILTON v. WALKER. (a)

Practice—Justices' jurisdiction—Two informations—Conviction on first information upon evidence of second—20 & 21 Vict. c. 43—Indecent Advertisement Act, 1889 (52 & 53 Vict. c. 18), ss. 3 and 4—11 & 12 Vict. c. 43, s. 10.

Justices having heard an information preferred against the appellant under sect. 4 of the Indecent Advertisements Act, 1889, did not acquit or convict the appellant, but proceeded to hear a second information against the appellant under sect. 3 of the Indecent Advertisements Act, 1889, and having heard the evidence against the appellant upon the second information under sect. 3, they convicted the appellant on the first information under sect. 4.

Held, that the magistrates, having heard evidence upon one information, and reserving their decision until they heard the evidence upon the second information, and then convicting on the first, their conviction could not be supported. That each case must stand upon its own merits, and must be decided upon the evidence given in it alone.

THIS was a case stated by certain of the justices of the peace for the county of Chester, under the statute 20 & 21 Vict. c. 43, and was to the following effect:

On the 22nd day of February, 1892, the informations herein-after mentioned were heard at the petty sessions holden at Sale, in the division of Altrincham, in the county of Chester. An information preferred by James Walker (hereinafter called the respondent) against A. Hamilton, otherwise Francis McConville (hereinafter called the appellant), and which is hereinafter referred to as the first information under sect. 4 of the Indecent Advertisements Acts, 1889 (52 & 53 Vict. c. 18), was proceeded with and heard charging that, on the 2nd day of January, 1892, the appellant, at Altrincham, in the county of Chester, unlawfully did deliver to one Thomas Wright, otherwise J. Farrell, certain indecent advertisements as defined by the Indecent Advertisements Act, 1889, with the intent that the same should be delivered to and exhibited to certain inhabitants and persons then being in or passing along the streets in the said town of Altrincham, contrary to the form of the statute.

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

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There was also, at the same time and place, another information hereinafter called the second information, charging that at the place and day before mentioned Thomas Wright, otherwise J. Farrell, did exhibit the said advertisements as in the first information charged, and that the said appellant did aid, abet, counsel, and procure the said Thomas Wright, otherwise J. Farrell in the commission of the said offence under sect. 3 of the said Indecent Advertisements Act.

After hearing the said first information, and being asked by counsel for the appellant to dismiss the said first information, we determined to proceed with and hear the second information, and having so proceeded with and heard the same, the appellant was thereupon duly convicted by us of the aforesaid offence, in the first information charged, and sentenced to a term of two calendar months’ imprisonment with hard labour.

The facts of the case were that on the 1st day of January, 1892, a parcel of printed matter was delivered by some person unknown at one of the railway stations in Liverpool, addressed to “J. Farrell, Railway Station, Altrincham, Cheshire, printed matter only, paid.”

On the following day the parcel was delivered at Altrincham railway station to a man who said his name was Thomas Wright. The said J. Farrell or Thomas Wright, when taking away the parcel from the station through a certain street in Altrincham, shook from the said parcel, through the wrapper or cover, which there appeared to be torn, some of the indecent pamphlets in question.

A police officer seized the parcel, which was found to contain about 1800 copies of the said indecent pamphlet, and he arrested the said J. Farrell or Thomas Wright on the charge of exhibiting the same, contrary to sect. 3 of the Indecent Advertisements Act, 1889, and he was convicted and sentenced to one month’s imprisonment with hard labour.

The pamphlets were indecent advertisements as defined by sect. 5 of the said Act; with directions to apply to the appellant at certain premises in Liverpool. At these premises it was proved that the applicant’s name was upon a glass panel in the door of the premises, and the appellant was proved to have been seen in the premises.

The questions of law upon these facts for the opinion of the court were: 1st, Whether there was upon the whole case any evidence against the appellant; 2nd, Whether there was any evidence that the appellant did deliver the said advertisements to Thomas Wright or J. Farrell; 3rd, Whether the evidence, being the same on both the first and second informations, a conviction could be legally made at the same time under sect. 4, and also under sect. 3 of the Indecent Advertisements Act, 1889 (52 & 53 Vict. c. 18).

Sect. 4 provides as follows:

Whoever gives or delivers to any other person any such pictures, or printed or written matter mentioned in sect. 3 of this Act, with the intent that the same, or

some one or more thereof, should be affixed, inscribed, delivered, or exhibited, as therein mentioned, shall on summary conviction in manner provided by the Summary Jurisdiction Acts be liable to a penalty not exceeding five pounds, or, in the discretion of the court, to imprisonment for any term not exceeding three months with or without hard labour.

Sect. 3 provides as follows :

Whoever affixes to or inscribes on any house, building, wall, hoarding, gate, fence, pillar, post, board, tree, or any other thing whatsoever, so as to be visible to a person being in or passing along any street, public highway, or footpath, and whoever affixes to or inscribes on any public highway or footpath, or throws down the area of any house, or exhibits to public view in the window of any house or shop, any picture or printed matter which is of an indecent or obscene nature, shall, on summary conviction in manner provided by the Summary Jurisdiction Acts, be liable to a penalty not exceeding forty shillings, or, in the discretion of the court, to imprisonment for any term not exceeding one month, with or without hard labour.

Hopwood, Q.C., and Dr. *Commins* for the appellant. — The question is whether the conviction could be made at the same time under sects. 3 and 4. Sect. 10 of Jervis's Act (11 & 12 Vict. c. 43) sets out the manner of making a complaint or laying an information, and says that "every such complaint shall be for one matter of complaint only, and not for two or more matters of complaint, and every such information shall be for one offence only, and not for two or more offences," and the section, therefore, does not refer to more than one information or complaint at a time. The law that a man shall not be tried for more than one offence has been violated here. The defendant here has been indicted under two sections, one suspended until the other heard, and then convicted. Here, there were two distinct offences: distributing these advertisements was an offence under sect. 3; delivering to another to distribute was a distinct offence under sect. 4. The defendant had a right to be convicted or acquitted upon the first information, after having been tried for the first offence.

Banks.—The point raised is under sect. 10 of Jervis' Act. This offence cannot be treated as two offences in one act, requiring two informations to be laid. If the justices were wrong in treating two offences as one offence, the point put against me is not stated in the case, and I would ask for the case to go back to be restated by the magistrates. [WILLIAMS, J. referred to *Knight*, (app.) v. *Halliwel* (resp.) (30 L. T. Rep. N. S. 359; 9 Q. B. 412; 43 L. J. 113, Mag. Cas. and 137 Q. B.) where it was held that the court could hear and determine any question of law arising on a case stated under 20 & 21 Vict. c. 43, notwithstanding that the question had not been reserved by or raised before the justices. POLLOCK, B.—I think that the justices did hear the second information before determining the first information. They reserved their judgment on the first information until they had listened to the other.]

Hopwood, Q.C., and Dr. *Commins* in reply.

POLLOCK, B.—This case raises an important question. There were before the magistrates (who state the case most fairly) two informations, one charging the defendant with having caused

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these advertisements to be distributed, and the other charging the defendant that he did himself exhibit these advertisements at the same time and place as was stated in the first information. The magistrates heard the evidence on the first information, and after having heard all the evidence upon the first information, and being asked by counsel to dismiss the first information, they proceeded to hear the evidence upon the second information; defendant was then convicted upon the first information. I am of opinion, after reading the stated case, and after hearing what took place, that the conviction cannot be supported. Each case stands upon its own merits, and the decision in each case must be decided upon the evidence given in that case alone.

WILLIAMS, J.—The defendant had a right to have the first case disposed of before the second case was heard. In this case, according to the case stated by the magistrates, there are two informations, one for delivering indecent advertisements and the other for aiding and abetting in the delivery of them. The magistrates heard the first case against the defendant, and then proceeded to hear the second case, and then convicted. This was bad, first, because the justices did what they did, and also because the defendant had a right to have his case on the first information dismissed.

Conviction quashed.

Solicitors: for the appellant, Cecil B. Taylor, Liverpool; for the respondent, A. Harris, Altrincham.

QUEEN'S BENCH DIVISION.

July 18 and 20, 1892.

(Before COLLINS and BRUCE, JJ.)

REG. v. MACKENZIE AND OTHERS. (a)

Practice—Form of conviction—Statement of offence—Defect in substance or form—Power of Court to amend—Justices—Interest—Bias—Conspiracy and protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 7—Summary Jurisdiction Act, 1879—11 & 12 Vict. c. 43, s. 1; 12 & 13 Vict. c. 45, s. 7; 42 & 43 Vict. c. 49, s. 39.

It is provided by the Conspiracy and Protection of Property Act (38 & 39 Vict. c. 86), s. 7, that every person who, with a view to compel any other person to abstain from doing any act which such other person has a legal right to do, wrongfully and without

(a) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

legal authority follows such other person with two or more other persons in a disorderly manner in or through any street shall, on conviction thereof by a court of summary jurisdiction, be liable to payment of a fine or to imprisonment. The defendant was convicted under the above section, but the conviction did not set out the acts with a view to compel the prosecutor to abstain from doing which the defendant followed the prosecutor.

Held, that the conviction was bad.

The justices forming the court which convicted the defendant were shareholders in companies owning ships which were insured in societies, such societies being members of an association of which the prosecutor was an agent.

Semble, that the justices were not so interested in the case as to be disqualified upon the ground that they were biassed.

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THIS was an order *nisi* calling upon Alexander George Mackenzie and certain other justices of the peace for the borough of Sunderland, and John Thomas Laurence, to show cause why a writ of *certiorari* should not issue to remove into this court a certain record of conviction under the hands and seals of the said justices, and bearing date the 19th day of May, 1892, whereby Johnson Henderson was convicted for that he on the 16th day of May, 1892, unlawfully did, with a view to compel John Thomas Laurence to abstain from doing acts which he the said J. T. Laurence had a legal right to do, wrongfully and without legal authority follow the said J. T. Laurence with two or more other persons in a disorderly manner in and through certain streets, to wit, High-street and West Sunniside in the said borough; and why the said conviction when returned should not be quashed upon the grounds:

(1) That the summons and conviction ought to have specified the acts with a view to compel the informant to abstain from doing which the defendant followed the informant.

(2) That some of the convicting justices were interested and biassed.

The defendant was summoned before the justices at Sunderland on the 19th day of May, 1892, for that he “unlawfully, with a view to compel the informant John Thomas Laurence to abstain from doing or to do acts which the informant had a legal right to do or abstain from doing, wrongfully and without legal authority persistently followed the informant about from place to place, and followed the informant with two or more other persons in a disorderly manner in or through High-street and West Sunniside in the said borough contrary to the form of the statute in such case made and provided.

It is provided by the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86):

Sect. 7. Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority:—

(5) Follows such other person with two more other persons in a disorderly

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manner in or through any street or road . . . shall on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour.

It was proved before the justices that the complainant Laurence was the agent at Sunderland of the Shipping Federation Limited, and that the defendant was an official of the National Amalgamated Seamen and Firemen's Union of Great Britain and Ireland, and that on the date in question the defendant led a large crowd of persons who in a disorderly manner followed the complainant through High-street and Sunniside with a view to compel him to abstain from following his occupation as agent of the Shipping Federation Limited, an act which he had a legal right to do.

The Shipping Federation Limited is a company established to amalgamate and federate shipowners and others interested in the shipping trade; to consider all questions affecting the interests of the shipping trade, and to take such action as may be necessary to promote such interests; to protect and indemnify the members of the company against any loss arising in the management of their trade without their actual privity or default; and for other similar objects.

The justices convicted the defendant of the offence charged against him, and ordered him to be imprisoned for fourteen days with hard labour; and the conviction was drawn up in the following form:

Johnson Henderson (hereinafter called the defendant) is this day convicted before this court for that he on the 16th day of May, 1892, at the township of Bishopwearmouth, within the said borough, unlawfully did, with a view to compel one John Thomas Laurence to abstain from doing acts which he the said John Thomas Laurence had a legal right to do, wrongfully and without legal authority follow the said John Thomas Laurence with two or more other persons in a disorderly manner in and through certain streets to wit High-street and West Sunniside in the said borough contrary to the statute in such case made and provided.

Lawson Walton, Q.C., for the justices, showed cause.—It is submitted that the conviction is good in form; it states the time, place, and person committing the offence, and also the offence itself. It is true that neither the summons nor conviction say what the acts were which the prosecutor was prevented from doing, but that is not necessary; the conviction follows the words of the section. The Court has power to amend if necessary under the provisions of 12 & 13 Vict. c. 45, s. 7. This is an objection for an alleged defect in substance or form, and cannot under the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 1, be taken or allowed. Upon a charge of obtaining money by false pretences the indictment must show what the false pretences were (*Rex v. Mason*, 2 T. R. 581); but in *Rex v. Gill and Henry* (2 B. & A. 204) it was held that where an indictment charged the defendants with conspiring to defraud by means of false pretences it was not necessary to set out the specific false pretences. He also referred to *R. v. Biggins* (26 J. P. 437). Upon the second ground it is submitted that the connection of the justices with

the Shipping Federation was so very remote that they were not thereby disqualified from adjudicating upon the case. Three of the justices held shares in companies which owned ships and insured them in societies which were members of the Shipping Federation.

Temperley, for the prosecutor, referred to *Reg. v. Rand* (L. Rep. 1 Q. B. 230); *Reg. v. Farrant* (57 L. T. Rep. N. S. 880; 20 Q. B. Div. 58).

Asquith, Q.C. and *Scott Fox* for the defendant.—The principle is plain, and applicable to every kind of conviction, viz., that the conviction must show every ingredient of the offence. It is no offence under this particular statute merely to follow a person about in a disorderly manner; the conviction must state the purpose with which the following is done. There is no power to amend a conviction under the provisions of 12 & 13 Vict. c. 45, s. 7. It is also submitted that the justices were so interested in the dispute between the Shipping Federation and the Seamen's Union that they were disqualified from hearing this case. They referred to *Leeson v. General Council of Medical Education and Registration* (61 L. T. Rep. N. S. 849; 43 Ch. Div. 336); *Reg. v. The Justices of Hertfordshire* (6 Q. B. 753).

Lawson Walton in reply.

COLLINS, J.—I am of opinion that in this case the rule must be made absolute, upon the ground that the conviction ought to have specified the acts from doing which the informant abstained in consequence of the actions of the defendant. This defect is one of substance and not in form only. The conviction, which did not follow the exact words of the summons, was as follows: "Johnson Henderson, hereinafter called the defendant, is this day convicted before this court for that he, on the 16th day of May, 1892, at the township of Bishopwearmouth, within the said borough, unlawfully did, with a view to compel one John Thomas Laurence to abstain from doing acts which he the said John Thomas Laurence had a legal right to do, wrongfully and without legal authority follow the said John Thomas Laurence, with two or more other persons, in a disorderly manner in and through certain streets, to wit, High-street and West Sunnyside, in the said borough." Now, I think, when we look at the section, that it is obvious that the conviction is faulty in form, for the statute (38 & 39 Vict. c. 86) provides by sect. 7 that every person who, with a view to compel any other person to abstain from doing any act which such other person has a legal right to do, wrongfully and without legal authority, follows such other person with two or more other persons in a disorderly manner in or through any street or road, shall be liable to conviction and punishment as therein provided. Now the Legislature, if it had thought fit, might have constituted it an offence merely to follow a person, but it has not. The gist of the offence is the following of a person with a view to compel such person to abstain from doing any act which he has a legal right to do. When a person is

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charged with that offence it is an answer to show that the person followed was not doing a lawful act, or that the person following was not doing so with a view to compel the other person to abstain from doing a lawful act. The conviction in this case does not address itself to the offence, but says that the defendant followed the prosecutor with a view to compel him to abstain from doing acts, without specifying what those acts were, so that, on the face of it, the conviction does not comply with the terms or substance of the statute. But, it has been said, this defect might be cured by amendment. Now it is a good test, in order to see whether that can be done, to ascertain what evidence the magistrates had before them, and on looking at the affidavit of the magistrates I find that they had not before them anything which constituted an offence, for in the second paragraph of their affidavit they say: "It was proved before us that the complainant Laurence is the agent at Sunderland of the Shipping Federation Limited, and that the defendant is an official of the National Amalgamated Seamen's and Firemen's Union of Great Britain and Ireland, and that on the date in question the defendant led a large crowd of persons who, in a disorderly manner, followed the complainant through High-street and West Sunnyside with a view to compel him to abstain from following his occupation as agent of the Shipping Federation Limited, an act which he had a legal right to do." Now, it says that he was following his occupation as agent of the Shipping Federation, which might be one act, but it is not obviously so. It is therefore impossible to say that the prosecutor had established an offence within the meanings of the statute, and upon that ground the conviction is bad. On the other ground, that the justices were biassed and so disqualified, it is not necessary for us to give any decision; but, in my opinion, there is no evidence to support that point. It was admitted during the argument that they had no pecuniary interest, so we have to deal with the question of bias only. If the defendant had shown that they were themselves the prosecutors, or that the justices were acting as such through their agents, that would have been sufficient to support the contention that they were biassed. But the prosecution is here instituted by the agent of the Shipping Federation, of which body none of the magistrates were members, and their only connection with it was most indirect, three of them holding shares in shipping companies which had ships insured in societies which were members of the federation. It seems to me that there was no likelihood of any bias existing on their part. The facts here are not nearly so strong as they were in *Leeson v. General Council of Medical Education and Registration* (61 L. T. Rep. N. S. 849; 43 Ch. Div. 366), where the majority of the Court of Appeal held there was no such interest in the matter in question on the part of two of the persons deciding it so as to disqualify them from taking part in the inquiry. This order must therefore be made absolute on the first ground only.

BRUCE, J.—I am of the same opinion. It is clear that the gist of the offence alleged in this case is following a person about with a view to preventing such person doing a legal act. And the justices in order to convict must find that the person was so followed, and with such an object in view. It was necessary under the old law to set out all the facts which constituted the offence, and not the mere result of them. As, for instance, where a person was convicted for profane cursing and swearing, it was held that a conviction was bad which did not set forth the oaths and curses. But the difficulty which has arisen in my mind in the present case is caused by sect. 39 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49) which says that the description of any offence in the words of the Act or other document creating the offence, or in similar words, shall be sufficient in law. Now, if in the present case the conviction had followed the words of the Act, it would have been good in law; it would have been sufficient if it had said that the defendant followed the prosecutor with a view to prevent him from doing some definite legal act, but it does not say so, and this, I think, is a variance in substance. I agree with Collins, J. upon the other point. In order to disqualify a justice from hearing a case, it must be shown that he has some substantial interest in the result, and in the present case there is no evidence to induce the court to come to the conclusion that the justices were disqualified on the ground of bias.

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Order absolute.

Solicitors for the justices, *Tufnell, Southgate, and Co.*, for *Barker*, Sunderland.

Solicitors for the prosecutor, *Bottrell and Roche*.

Solicitors for the defendant, *Watson, Browne, and Co.*, for *Bentham*, Sunderland.

QUEEN'S BENCH DIVISION.

Monday, Aug. 8, 1892.

(Before Lord COLERIDGE, C.J., and CAVE, J.)

REG. v. JUSTICES OF SURREY AND BELL. (a)

Practice—Appeal to quarter sessions against punishment imposed by conviction by court of summary jurisdiction—Sentence of imprisonment—No appearance by respondent—Jurisdiction of quarter sessions to quash whole conviction.

(a) Reported by W. H. HORSFALL, Esq., Barrister-at-Law

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The respondent was convicted before a Court of summary jurisdiction for causing a horse to be cruelly ill-treated, and was sentenced to fourteen days' imprisonment with hard labour. He gave notice of his intention to appeal to quarter sessions upon the ground that the punishment was excessive.

No one appeared on behalf of the prosecution at the sessions, and the respondent (the then appellant) having proved the service of his notices of appeal, the Court quashed the conviction.

Held, that the Court of Quarter Sessions was right in quashing the conviction, as there was no evidence before it upon which it could decide what punishment was right, and it could not leave the conviction standing without some judgment thereon.

THIS was a rule *nisi* calling upon the justices for the county of Surrey and Philip Henry Bell to show cause why a writ of *certiorari* should not issue directed to the said justices to remove into this Court an order, made by them on the 5th day of April, 1892, that a conviction made by Montagu Williams, Esq., Q.C., be quashed, on the ground that they had no jurisdiction to quash such conviction, inasmuch as the notice of appeal served upon the respondent set forth that the ground of appeal was that the punishment was excessive only, and no appeal against the conviction was before the court; and further, that the said notice was bad on the face of it.

On the 25th day of November, 1891, an information was preferred at the Wandsworth Police-court, in the county of Surrey, before Montagu Williams, Esq., Q.C., the then sitting magistrate, against Phillip Henry Bell, for cruelty to a horse. On the hearing of the information the magistrate convicted the defendant, and sentenced him to fourteen days' imprisonment with hard labour.

Upon the same day the defendant gave notice of his intention to appeal against the decision of the magistrate upon the ground that the punishment was excessive. The notice did not state to what court of quarter sessions the appeal would be made.

The appeal came on for hearing at the Surrey Sessions, held in January, 1892, and it was arranged between the parties, with the sanction of the court, that the hearing of the appeal should stand over until the April sessions.

Upon the 6th day of April the appeal again came on for hearing at the Surrey Sessions, but, as no one appeared on behalf of the prosecution, the justices quashed the conviction and released the defendant from custody without the matter being gone into.

It was now sought to quash the order of the Court of Quarter Sessions upon the ground that that court had no jurisdiction to quash the order of the magistrate, as the appeal was only against the alleged excessive punishment awarded, and not against the conviction itself.

Poland, Q.C. and Elliott showed cause on behalf of the

respondent.—The respondent was not represented before the magistrate at the original hearing of the case by either solicitor or counsel, and when he was convicted he sent for his solicitor, who drew the notice of appeal at once in order that the respondent might be released from custody upon bail. The prosecutor says that he thought the appeal would be held at the London Sessions, and so he did not appear at the Surrey Sessions, and that the notice of appeal ought to have stated that the appeal would be heard at the Surrey Sessions; but the London Sessions has no jurisdiction, and the appeal as a matter of course lies to the Surrey Sessions. At the hearing at the sessions the court was bound by the decision in *Reg. v. Purdey* (11 L. T. Rep. N. S. 309; 5 B. & S. 909) and quashed the conviction. It is provided by the Prevention of Cruelty to Animals Act (12 & 13 Vict. c. 92), s. 26, that “no conviction under the authority of this Act, nor any order, judgment, or proceeding relative thereto shall be quashed for want of form, or be removed by *certiorari* or otherwise into Her Majesty’s Superior Courts of record.” And it has been held that a *certiorari* cannot be issued in such a case as the present: (*Reg. v. Chantrell*, 33 L. T. Rep. N. S. 305; L. Rep. 10 Q. B. 587). The Court of Quarter Sessions, if they had gone into the merits of the case and found that the respondent should not have received any sentence, would have been obliged to quash the conviction, as the conviction would then have stood without any punishment appearing upon the face of it, and would therefore have been bad. They also referred to *Reg. v. Justices of Surrey* (26 L. T. Rep. N. S. 22; L. Rep. 5 Q. B. 466); *Ex parte Hopwood* (15 Q. B. 121); *Reg. v. Justices of Middlesex* (35 L. T. Rep. N. S. 402; 2 Q. B. Div. 516).

Colam in support of the rule on behalf of the prosecutor.—It is submitted that the notice of appeal was bad upon the face of it, because it did not state to what sessions the appeal was going to be made. The respondent was bound by his notice of appeal, and could not go into any question except that of the punishment being excessive, for it is provided by 12 & 13 Vict. c. 45, s. 1, that, it shall not be lawful for the appellant on the trial of any such appeal to go into or give evidence of any other ground of appeal besides those set forth in such notice. The appeal here was against the amount of the punishment and not against the conviction; the Court might therefore have modified the punishment, but it had no jurisdiction to quash the conviction altogether. [CAVE, J. referred to *Rex v. Vipant*, 7 Burrows, 1163.] There must be an appeal against the conviction before it can be quashed.

LORD COLERIDGE, C.J.—In this case nothing which I say must be taken to apply to the point which has not been argued before us, viz., the merits of the case; the magistrate who heard the case in the first instance may have been, and probably was, quite right in the decision at which he arrived, and I express no opinion upon it. I am sorry that we have to determine the case upon a legal

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technicality ; but I am of opinion that the *certiorari* in this case ought not to go. The proper practice to be followed in the case of an appeal to quarter sessions is very correctly laid down in Dickinson's Guide to Quarter Sessions, 6th edit., p. 642, in the following passage : " When the appeal is brought regularly before the sessions by the proof or on the admissions above described, and is not adjourned, the leading counsel for the respondents, as the party sustaining the order or other act complained of, opens his case on the merits, and adduces evidence in support of it, without being confined to that produced before the magistrates below." In the present case the prosecutor, the respondent before the Court of Quarter Sessions, was the person who wished to sustain the punishment ; he did not appear, and it seems to me that the sessions did exactly what the course of practice justified them in doing. It was laid down by Lord Kenyon, C.J. in *Rex v. Newbury* (4 T. R. 475), that " law, justice, and convenience required that the respondents should begin in cases of this kind as well on appeals as on orders of removal ;" and that ruling was approved of by Buller, J. So that the practice was rightly followed, and there were only two things open to the Court of Quarter Sessions to do ; they might either have altered the conviction in point of punishment, but there was no one there to prove to the court what the facts of the case were from which the court might form an opinion as to what the right punishment, if any, would be ; or they might have struck out the punishment and left the conviction. In the latter alternative, as in the case of *Rex v. Vipont* (2 Burrows, 1163), the conviction would have been in such a state that they would then have been compelled to quash it. We must therefore decide this case upon what has been the practice up to the present time, although I regret that the case has not been decided upon its merits. This rule must therefore be discharged.

CAVE, J.—I am of the same opinion. When we come to consider what is the course of practice adopted at sessions it appears to me that the justices in the present case followed the only course which was open to them. There may be an appeal against a part only or the whole of a verdict and judgment ; in the present case the appeal was against the judgment only and not against the verdict. It is first necessary for the appellant to put himself right in court by proving that the notices required by statute have been duly served, but in other respects an appeal to quarter sessions differs from an appeal to the High Court. In the latter case it is for the appellant to satisfy the court that the verdict of which he complains is not right ; but at quarter sessions it is different, for the court there has nothing before it on which to form a judgment. The respondent has therefore to begin and prove the facts which he alleges justify the verdict, and the court must decide on the evidence called before it, and not on the evidence heard in the court below. In this case the respondent was not present to establish the facts upon which he relied, and the

appellant very prudently did not produce any evidence before the court. Under these circumstances what could the justices do? They could not say that the judgment of fourteen days' imprisonment was right, nor could they say that seven days' or any other punishment was right, for they had no evidence before them. They could only say that the adjudication was not established, and therefore they struck it out, and they quashed the conviction because it would have been bad if it had been left in alone without any judgment upon it. I think that the justices were right, and that this rule must be discharged.

Solicitor for the prosecutor, *A. Leslie.*

Solicitor for the respondent, *G. F. Bell.*

Rule discharged.

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QUEEN'S BENCH DIVISION.

June 15 and 16, 1892.

(Before GRANTHAM and CHARLES, JJ.)

ROLFE (app.) v. THOMPSON (resp.). (a)

*Adulteration of food—Submission of sample to public analyst—
Division of sample—Half of sample only sent to be analysed—
Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63),
ss. 6, 13, 14, 15—Sale of Food and Drugs Act Amendment Act,
1879 (42 & 43 Vict. c. 30), s. 3.*

The appellant, an inspector of nuisances, obtained samples of milk consigned by the respondent. He divided each sample into two parts, retaining one in his own possession, and sending the other to the public analyst.

Held (following Rouch v. Hall, 44 L. T. Rep. N. S. 183; 6 Q. B. Div. 17), that the inspector had submitted a sample within sect. 3 of the Act of 1879 (42 & 43 Vict. c. 30), and that the respondent might therefore rightly be convicted.

THIS was a case stated, raising a point, under the Sale of Food and Drugs Act, 1875, and the Sale of Food and Drugs Act Amendment Act, 1879, as to whether the same preliminaries are necessary when milk is intercepted, under sect. 3 of the later Act, as when it is bought for analysis, and

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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whether it vitiates the whole proceedings if the intercepting inspector divides the sample after taking it.

The following are the facts :

On the 6th day of April, 1892, the respondent was charged, before a metropolitan police magistrate, at the instance of the appellant, an inspector of nuisances, for that he did "sell to the prejudice of the purchaser certain milk which was not of the nature, substance, and quality of the article demanded by the purchaser, the said milk containing a percentage of added water, contrary to the provisions of the Sale of Food and Drugs Acts, 1875 and 1879.

It appeared that on the morning of the 27th day of February last six churns, containing milk, arrived at King's Cross station, consigned by the respondent to one Handsley. Immediately on their arrival the appellant took a sample from each of the churns, in the presence of a foreman porter in the employment of the Great Northern Railway Company, and of Handsley's foreman. He then divided each of the samples so taken into two parts, retaining one part of each of the samples in his own possession, and sending the other part of them to the public analyst.

It was contended on behalf of the respondent that the provisions of sect. 15 of the Act of 1875 (38 & 39 Vict. c. 63) had not been complied with; that the entire sample taken ought, in each case, to have been submitted to the public analyst, to be by him divided into two parts, and that the appellant having made an improper and unauthorised division, the respondent could not be convicted. On the other side it was contended that, since the samples had been taken under sect. 3 of the Amendment Act of 1879 (42 & 43 Vict. c. 30) the steps imposed by the earlier Act were not necessary, and that conviction might take place, notwithstanding the division of the samples by the appellant.

The learned magistrate decided that the contention of the respondent was right, and he accordingly dismissed the summonses, subject to the present case for the opinion of the High Court.

The offence with which the respondent was charged is created by sect. 6 of the Sale of Food and Drugs Act, 1875, which provides that,

No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds.

By sect. 13 of the same Act it is enacted that,

Any inspector of nuisances . . . may procure any sample of food or drugs, and if he suspect the same to have been sold to him contrary to any provision of this Act, shall submit the same to be analysed by the analyst of the district or place for which he acts.

And by sect. 14 of the same Act it is provided that,

The person purchasing any article with the intention of submitting the same to analysis, shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article, his intention to have the same analysed

by the public analyst, and shall offer to divide the articles into three parts to be then and there separated, and each part to be marked and sealed and fastened up in such manner as its nature will permit, and shall, if required to do so, proceed accordingly, and shall deliver one of the parts to the seller or his agent. And he shall afterwards retain one of the said parts for future comparison, and submit the third part, if he deems it right to have the article analysed, to the analyst.

By sect. 15 :

If the seller or his agent do not accept the offer of the purchaser to divide the article purchased in his presence, the analyst receiving the article for analysis shall divide the same into two parts, and shall seal or fasten up one of those parts, and shall cause it to be delivered, either upon receipt of the sample, or when he supplies his certificate, to the purchaser, who shall retain the same for production in case proceedings shall afterwards be taken in the matter.

By sect. 3 of the Amending Act, 1879 (42 & 43 Vict. c. 30), under which these summonses were taken out, it is enacted that,

Any . . . inspector of nuisances . . . may procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee, in pursuance of any contract for the sale to such purchaser or consignee of such milk ; and such . . . inspector, if he suspect the same to have been sold contrary to any of the provisions of the principal Act, shall submit the same to be analysed, and the same shall be analysed, and proceedings shall be taken, and penalties on conviction be enforced, in like manner in all respects as if such . . . inspector had purchased the same from the seller or consignor under sect. 18 of the principal Act.

J. V. Austin for the appellant.—This case is concluded by *Rouch v. Hall* (44 L. T. Rep. N. S. 183 ; 6 Q. B. Div. 17). What was actually sent on in the present case by the inspector to the analyst was a sample. Sect. 15 of the Act of 1875 has no application to proceedings under sect. 3 of the Act of 1879. See also *Horder v. Scott* (42 L. T. Rep. N. S. 660 ; 5 Q. B. Div. 552).

Poland, Q.C.—The statute provides that the whole sample shall be sent to the analyst ; but here, not the whole sample, but only a part of it was sent on. To hold this proceeding legal would enable an inspector in many cases to send on a half of a sample which does not represent the whole, as, for example, the upper portion of a liquid which has a sediment. The inspector must send on all that he takes. This is a criminal offence, and the statute imposing the penalty must therefore be construed strictly.

GRANTHAM, J.—Having heard what has been said on behalf of the magistrates by Mr. Poland, I am of opinion he must be overruled. It is quite clear that he was unaware of the case of *Rouch v. Hall* (44 L. T. Rep. N. S. 183 ; 6 Q. B. Div. 17) or the present case would not have been stated in the way in which it has been. The test is was it a sample ? And that is a question of fact ; if some of the milk should be accidentally lost, the remainder would not cease to be a sample, and so, if the bearer of the sample of milk should fall and spill some of it, or if he should consume some of it and send on only that which is left, it would no less be a sample. It is true that such things might be done in fraud, but that does not prevent the portion which is

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*Adulteration
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samples to
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Half only of
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—38 & 39
Vict. c. 68,
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actually sent on from being a sample. I am of opinion that we are bound by the case of *Rouch v. Hall* (*ubi sup.*), and that the mere dividing the quantity of milk did not prevent that part which was sent on from being a sample.

CHARLES, J.—I am of the same opinion. The contention of the person charged, to which the magistrate thought right to give effect, is clearly inconsistent with the case cited to us. I confess I felt some difficulty at first, because this is a criminal offence, and it is right, therefore, that these statutes should be strictly construed; but, after hearing the arguments on both sides, I am clearly of opinion that a sample within sect. 3 of the Act of 1879 was delivered to the analyst. In one sense it was only a half sample, but in another sense it comes within the words “any sample,” and what the inspector delivered to the analyst was a sample, though it was not all the milk which he took out of the churn.

Judgment for the appellant, allowing the appeal. Case remitted to the magistrate.

Solicitor for the appellant, *William Lewis*.

Solicitors for the respondent, *Wontner and Sons*.

CROWN CASES RESERVED.

Saturday, Aug. 6, 1892.

(Before Lord COLERIDGE, C.J., SMITH, L.J., POLLOCK, B., CAVE and BRUCE, JJ.)

REG. v. WAITE. (a)

Infant—Capacity for committing felony—Presumption of law—Indictment for unlawfully and carnally knowing girl under thirteen—Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 4.

The Criminal Law Amendment Act, 1885, has not altered the common law that an infant under the age of fourteen years is to be presumed to be doli incapax, and cannot therefore be convicted of felony.

Held, therefore, that a conviction of a lad under that age for

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

unlawfully and carnally knowing a girl under the age of thirteen could not be sustained.

CASE stated by Wright, J. as follows:—Enos Waite, aged thirteen, was convicted before me at the last assizes for the county of Warwick of the felony of carnal knowledge of a girl of under thirteen years of age, namely of eight years of age. The offence was fully proved. I passed sentence of two months imprisonment and whipping, but I reserved this case on the question of law which arose at the trial whether a male of less than fourteen years of age can be guilty of an offence against sect. 4 of the Criminal Law Amendment Act. See as to rape: *Reg. v. Groombridge* (7 C. & P. 582), *Reg. v. Phillips* (8 C. & P. 736; 1 Hale, P. C. 631).

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He is also sentenced to a concurrent term of imprisonment for two months upon an indictment for a common assault upon another girl of eight years of age. The sentence of whipping will not be executed unless before the expiration of the two months the conviction of the felony is affirmed by the court.

If the conviction for felony is wrong, the punishment of whipping (which seems most appropriate to such cases) cannot be inflicted where the offence is committed by a male under fourteen.

By the Criminal Law Amendment Act 1885 (48 & 49 Vict. c. 69), s. 4, it is enacted (*inter alia*) that :

Any person who unlawfully and carnally knows any girl under the age of thirteen years shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the court to be kept in penal servitude for life, or for any term not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour.

Any person who attempts to have unlawful carnal knowledge of any girl under the age of thirteen years shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour. Provided that in the case of an offender whose age does not exceed sixteen years, the court may, instead of sentencing him to any term of imprisonment, order him to be whipped, as prescribed by the Act of the twenty-fifth and twenty-sixth Victoria, chapter eighteen, intituled "An Act to amend the law as to the whipping of juvenile and other offenders," and the said Act shall apply so far as circumstances admit as if the offender had been convicted in manner in that Act mentioned; and if, having regard to his age and to all the circumstances of the case, it shall appear expedient, the court may, in addition to the sentence of whipping, order him to be sent to a certified reformatory school, and to be there detained for a period of not less than two years, and not more than five years.

No one appeared on behalf of the prisoner.

Stubbins, in support of the conviction, referred the court to the cases of *Rex v. Eldershaw* (3 C. & P. 396), *Rex v. Groombridge* (7 C. & P. 582), *Reg. v. Phillips* (8 C. & P. 736), and *Reg. v. Jordan* (9 C. & P. 118), as establishing that in a prosecution of a lad under the age of fourteen years for rape, the court will not inquire into the question of his capacity for completing the offence, but will assume as a matter of law that he is incapable of so doing. He, however, submitted, on the authority of *Reg. v. Brimilow* (2 Moo. C. C. 122), that upon this indictment the

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prisoner could be convicted under 24 & 25 Vict. c. 100, s. 43, for assault. In that case upon an indictment for rape, a conviction for an assault under 1 Vict. c. 85, s. 11, which is repealed by 24 & 25 Vict. c. 95, s. 1, was sustained by the Court for Crown Cases Reserved. [Lord COLERIDGE, C.J.—Are we to understand that the learned judges in that case held that a lad can be convicted of an attempt to commit that which the law presumes he could not have committed?] It is not submitted that they went so far as that, the authorities are no doubt against the conviction for the graver offence, but it is submitted that the prisoner could be convicted of the assault. In Hale's Pleas of the Crown, vol. 1, p. 25, is a note of a case where one John Dean, an infant between eight and nine years, was indicted, arraigned, and found guilty of burning two barns in the town of Windsor; and it appearing upon examination that he had malice, revenge, craft, and cunning, he had judgment to be hanged, and was hanged accordingly. And Lord Hale appears to have considered that in the case of an infant over twelve and under fourteen years of age, it is for the court to consider whether in the particular case the infant intended to commit the offence. [POLLOCK, B.—The presumption of law as to the capacity of the infant in such a case as this does not depend upon the mental condition of the infant.]

Lord COLERIDGE, C.J.—Unless there is some very clear reason why we should think otherwise, we should hold that the Criminal Law Amendment Act, 1885, left the common law standing with reference to the point in question. As laid down by Lord Hale, "an infant under the age of fourteen years and above the age of twelve years is not *primâ facie* presumed to be *doli capax*, and therefore regularly for a capital offence committed under fourteen years, he is not to be convicted as a felon, but may be found not guilty: (Hale's P. C. vol. 1, p. 25.) In the authorities which have been cited it is a physical and not a mental incapacity as to which the judges would not admit evidence, it is a presumption of law that you cannot alter. Therefore, unless the Criminal Law Amendment Act has altered the common law, the prisoner cannot be found guilty of the full offence. With regard to the question of the attempt to commit the offence, he has not been found guilty of that, and therefore he cannot be convicted. The only case which in any way supports the conviction is that of *Reg. v. Brimilow* (2 Moo. C. C.), which seems to show that a person may be convicted of attempting to do that which he cannot be found guilty of doing. That question, however, does not arise here, and will have to be dealt with when it does arise. In my opinion this conviction was wrong, and must be quashed.

SMITH, L.J.—I am of the same opinion. The authorities have been uniform up to and since the authority of Lord Hale, that a lad under the age of fourteen cannot be found guilty of the offence with which the prisoner was charged. The question of attempt does not arise, as my lord has pointed out, because the

conviction is for the full offence. It cannot, in my opinion, be supported, and must be quashed. The prisoner must be imprisoned for two months, instead of undergoing the more appropriate punishment of being whipped.

POLLOCK, B., CAVE, and BRUCE, JJ. concurred.

Conviction quashed.

Solicitor for the prosecution, *The Solicitor to the Treasury.*

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QUEEN'S BENCH DIVISION.

Thursday, May 5, 1892.

(Before DAY and CHARLES, JJ.)

CARLE (app.) v. ELKINGTON (resp.). (a)

Summary jurisdiction—Right to claim trial by jury—Person summoned before court of summary jurisdiction—Fine of 100l. imposed by statute for offence—Brewer for sale—Offence of making untrue entry in book—Right of person charged with such offence to claim trial by jury—Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), s. 20—Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), ss. 17, 53.

Sect. 17 of the Summary Jurisdiction Act, 1879, provides that a person charged before a court of summary jurisdiction "with an offence in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months," may claim to be tried by a jury; and sect. 53 provides that where the sum adjudged by conviction under any of the statutes relating to the Revenue to be paid exceeds 50l., the court may, in default of sufficient distress, imprison for a term exceeding three months, but not exceeding six months.

Sect. 20 of the Inland Revenue Act, 1880, imposes a fine of 100l. for every contravention of the section, which provides that a brewer for sale shall (inter alia) enter in a book kept for that purpose the quantity of malt which he intends to use in his next brewing, and shall not make in such book any entry which is untrue.

Held, that a person who is summoned under sect. 20 of the Inland

(a) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

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ss. 17, 58;
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Revenue Act, 1880, before a court of summary jurisdiction, for making in this book an untrue entry, has not the right, under sect. 17 of the Summary Jurisdiction Act, 1879, to demand to be tried by a jury, but such person may be tried by the justices without a jury.

CASE stated by sect. 33 of the Summary Jurisdiction Act, 1879, by justices of the peace for the county of Stafford.

At a petty sessions holden at Wolverhampton in and for the Wolverhampton Petty Sessional Division of the Hundred of Seisdon North, in the county of Stafford, on the 11th day of January, 1892, an information was preferred by the appellant against the respondent under sect. 20 of the Act (43 & 44 Vict. c. 20) as follows:

The information of Joseph Carle, of Albrighton, one of Her Majesty's officers of Inland Revenue, who prosecutes for her said Majesty in this behalf, by order of the Commissioners of Inland Revenue, states that the said Henry James Elkington, of Pattingham, in the county of Stafford, before and at the time hereinafter mentioned, was a brewer of beer for sale, and that on the 9th Sept., 1891, in the parish of Pattingham, in the county aforesaid, the said Henry James Elkington, so being such brewer as aforesaid, made an entry in the book duly delivered to and kept by him as such brewer for the purpose of making therein the entries required by the statute in that behalf, that the quantity of malt which he intended to use in his then next brewing was one quarter and two bushels, which entry was untrue in this particular, that the quantity of the said malt was in fact a much greater quantity than one quarter and two bushels, to wit, one quarter and five bushels, contrary to the form of the statute in such case made and provided, whereby and by force of the said statute, "the said Henry James Elkington, being such brewer as aforesaid, had incurred a fine of one hundred pounds."

After the said charge had been read to the respondent, but before the same was gone into, the clerk of the court read to him the address or option authorised by sect. 17 (sub-sects. 1 and 2) of the Summary Jurisdiction Act, 1879, as follows:

You are charged with an offence in respect of the commission of which you are entitled, if you desire it, instead of being dealt with summarily, to be tried by a jury. Do you desire to be tried by a jury? Being dealt with summarily means that you will now be tried by this court. If you desire to be tried by a jury, you can be so tried at the next quarter sessions for this county to be holden at Stafford.

And in reply the respondent, through his solicitor, said he desired to be tried by a jury.

Upon this Mr. Alpe, counsel in the case appearing for and on behalf of the Inland Revenue, objected to the option being given to the respondent of being tried by a jury, stating that sect. 17 (sub-sects. 1 and 2) of the Summary Jurisdiction Act, 1879, only applied to cases where the punishment was imprisonment in the first instance exceeding three months, and did not apply to this case, where the punishment was a penalty, and that imprisonment only followed in case of the fine not being paid, and there not being sufficient distress to satisfy the fine.

The justices, however, overruled the objection, being of opinion that, as the defendant was liable in the case before them to a penalty of 100*l.*, for the nonpayment of which they might imprison him for more than three months, namely, up to six months (see sect. 58 of the Summary Jurisdiction Act, 1879), that sect. 17

(sub-sect. 1 and 2) did apply, and the respondent was entitled to have such option read to him to be tried by a jury, being of opinion that where the offence charged is of so serious a nature that a defendant may upon conviction, whether imprisonment was awarded in the first instance, or only upon the nonpayment of a fine, actually find himself in prison for a term exceeding three months, then he was entitled to the option given under sect. 17 (sub-sects. 1 and 2), the term of imprisonment for default in payment of a penalty being part and parcel of the conviction, and awarded at the time of giving judgment.

Counsel for the Inland Revenue then said that, as the justices were against him on the point of law, he would not proceed upon the said information further that day, but asked the justices to adjourn the hearing thereof *sine die* (which they acceded to), and the appellant being dissatisfied with their determination as being erroneous in point of law, duly applied in writing on the 15th day of January, 1892, to the justices to state and sign a case for the opinion of the court.

Counsel for the Inland Revenue, in objecting to the ruling of the justices, quoted *Reg v. Lake* (46 J. P. 88) and *Williams v. Wynn* (52 J. P. 343), but the justices considered that these cases were not quite in point, and did not sufficiently support his contention; and moreover they had in their minds the case of *Pugh v. James* (48 J. P. 56), which was an Excise case, as the present one is, where the same objection was taken at the Cardiganshire Quarter Sessions, in 1884, and when the chairman granted a case upon the same point. The justices were also aware that the case had never been argued, and that the point still remained undecided. They also quoted from Stone's Justices' Manual (26th edit.), p. 275, where it appeared to them clear that the learned editor was of opinion that the option must be given in Excise cases like the present; and from page 42 of Stone, note (D), which is as follows:

This section was probably intended to apply only to imprisonment without the option of fine, but it seems to extend to all convictions where more than three months' imprisonment can be given.

The question of law is, whether the respondent has the right to demand to be tried by a jury in pursuance of sect. 17 of the Summary Jurisdiction Act, 1879. And whether such section applies to a case where an information has been laid in contravention of sect. 20 of the Inland Revenue Act, 1880, and the person accused of the contravention is charged with the said offence before a court of summary jurisdiction.

The Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), provides:

As to Brewers for Sale.

Sect. 19. Any person who brews beer for the use of any other person at any place other than the premises of the person for whose use the beer shall be brewed, and any person licensed to deal in, or retail, beer, who brews beer, shall be deemed to be a brewer for sale.

Sect. 20. A book in the prescribed form shall be delivered by an officer to every

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1879—Inland
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1880—42 & 43
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brewer for sale, and the following provisions shall have effect in relation to the book, and to the entries to be made therein: (2) The brewer shall enter separately in the book the quantity of malt, corn, and sugar, which he intends to use in his next brewing, and also the day and hour when such next brewing is intended to take place.

xi. (7) The brewer shall not cancel, obliterate, or alter any entry in the book, or make therein any entry which is untrue in any particular.

For any contravention of this section the brewer shall incur a fine of one hundred pounds.

Danckwerts for the appellant, the officer of the Inland Revenue. —The question here is whether the respondent is entitled to be tried by a jury, under sect. 17 of the Summary Jurisdiction Act, 1879. That section says that a person charged with an offence "in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months," &c., may claim to be tried by a jury. These are the important words, and the case turns upon them. The respondent here was charged with an offence under sect. 20 of the Inland Revenue Act, 1880—the offence, under sub-sect. 7, of making an untrue entry in the book, of inscribing in the book a statement which was untrue in fact. That section expressly says that the punishment for any contravention of the section is a fine of one hundred pounds, and the justices held that the case fell within that section, and that the respondent was entitled to be tried by a jury. [DAY, J.—Can any information for this offence be tried before a commissioner of Excise?] Formerly it could, but not so now. [DAY, J.—It is clear a commissioner of Excise could not summon a jury. CHARLES, J. refers to sect. 53, of the Summary Jurisdiction Act, 1879, and to the words in that section "or in respect of the default of a sufficient distress."] The section only imposes imprisonment in such a case as this, "in respect of the default of a sufficient distress to satisfy such sum:" so that this is one of the cases in which by reason of 8 Geo. 4, c. 53, the revenue authorities must go through distress first. [DAY, J.—It seems to me that your case is, that the respondent is not liable to imprisonment, he is only liable to this fine in the first instance, and then it may be to imprisonment in default of sufficient distress.] It is submitted that that is so, and the period of imprisonment in default of distress is limited in sect. 5 of the Act. There is a decision exactly in point, the case of *Williams v. Wynn* (52 J. P. 343), where Cave, J. gave a judgment which supports the contention. So also does the case of *Reg. v. Lake* (46 J. P. 88). The application is therefore for an order that the case may be sent back for trial by the justices without a jury.

The respondent did not appear.

The Court (Day and Charles, JJ.) assented to the appellant's contention, and made an order (allowing the appeal) that the case be sent back to be tried by the justices without a jury.

Appeal allowed. Case remitted to be tried by justices.

Solicitor for the appellant, *The Solicitor of Inland Revenue.*

QUEEN'S BENCH DIVISION.

Monday, July 11, 1892.

(Before WRIGHT and COLLINS, JJ.)

RIDGEWAY (app.) v. FAENDALE (resp.) (a)

Vagrancy—Gaming—Betting in a public place—Instrument of gaming “at any game or pretended game of chance”—Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4—Vagrancy Act, 1873 (36 & 37 Vict. c. 38), s. 3.

In order to convict under the Vagrancy Act, 1873 (36 & 37 Vict. c. 38), s. 3, of the offence of “playing or betting by way of wagering or gaming, in a public place, with a coin, card, token, or other article used as an instrument or means of wagering or gaming,” it is also necessary to allege and prove that the defendant was guilty of wagering or gaming at some “game or pretended game of chance,” which is an essential part of the offence.

THIS was a case stated by the stipendiary magistrate for Birmingham.

An information was laid against the appellant charging him that he did unlawfully bet, by way of wagering, in a certain street, with certain articles used as a means of wagering, to wit, written papers and coins, contrary to the Vagrancy Act Amendment Act, 1873 (36 & 37 Vict. c. 38), s. 3, and was heard and determined by the stipendiary magistrate.

On the part of the appellant it was contended that the information did not disclose any offence, inasmuch as the words “at any game or pretended game of chance,” which governed the whole of the section, were omitted, and that to constitute any offence it was necessary not only to allege but to prove the allegation that it was a game or pretended game of chance.

It was contended on the part of the respondent that the words “betting by way of wagering” in the section were not governed by the phrase “at any game or pretended game of chance,” those words only applying to their immediate antecedent “gaming,” that they could not refer to “betting by way of wagering” or to “wagering,” as it was incorrect to speak of wagering “at” a game, the proper expression being “on” a game.

The magistrate was of opinion that the contention on the part of the respondent was correct, and convicted the appellant.

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

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tion—Mate-
rial averment
— User of in-
strument of
gaming—In-
strument
must have
been used at
game or pre-
tended game
of chance.*

The conviction, which was fully set out in the case, stated that the appellant was convicted of being a rogue and vagabond within the intent and meaning of 5 Geo. 4, c. 83, that is to say, that he on, &c., at, &c., did unlawfully bet by way of wagering, in a certain street, with certain articles used as a means of such wagering, to wit, written papers and coins, contrary to the form of the statute.

If the court should be of opinion that the contention of the appellant was correct, the conviction was to be quashed—if not the conviction was to remain in force.

By 36 & 37 Vict. c. 38, s. 3, it is enacted as follows :

Every person playing or betting by way of wagering or gaming in any street, road, highway, or other open and public place, or in any open place to which the public have or are permitted to have access, at or with any table or instrument of gaming, or any coin, card, token, or other article used as an instrument or means of such wagering or gaming, at any game or pretended game of chance, shall be deemed a rogue and vagabond within the true intent and meaning of the recited Act (5 Geo. 4, c. 83), and as such may be convicted and punished under the provisions of that Act, or in the discretion of the justice or justices trying the case, in lieu of such punishment, by a penalty for the first offence not exceeding forty shillings, and for the second or subsequent offence not exceeding five pounds.

Poland, Q.C. (A. T. Lawrence with him), for the appellant, against the conviction, was stopped by the Court.

Ohannell, Q.C. (Hugo Young with him), for the respondent, in support of the conviction.—The conviction was right. One offence under the Vagrancy Act, 1873 (36 & 37 Vict. c. 38), s. 3, is playing or betting in a public place "at or with any table or instrument of gaming at any game or pretended game of chance," which is also an offence under the Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4. The Act of 1873 creates a further offence by the use of the additional words "or any coin, card, token, or other article used as an instrument or means of such wagering or gaming." It is unnecessary, when charging an offence comprised in these words, to allege or prove that the playing or betting was at a game or pretended game of chance, for the expression "at any game or pretended game of chance" governs only the words which occur in the Act of 1824, and not the additional words introduced into the Act of 1873.

WRIGHT, J.—The offence as described by the older Act—the Vagrancy Act of 1824 (5 Geo. 4, c. 83), s. 4—was "playing or betting in any street, road, highway, or other open and public place, at or with any table or instrument of gaming at any game or pretended game of chance." The later Act—the Vagrancy Act of 1873 (36 & 37 Vict. c. 38), s. 3—contains a similar provision, with the addition of the words "or any coin, card, token, or other article used as an instrument or means of such wagering or gaming," but in the Act of 1873 the words "at any game or pretended game of chance" remain a part of the essential definition of the offence. In the present case those words are omitted from the information, and the magistrate has come to no finding on an essential part of the case, namely, that the appellant was

wagering or gaming "at any game or pretended game of chance." The conviction therefore is invalid on the face of it, and must be quashed.

COLLINS, J. concurred.

Conviction quashed.

Solicitor for the appellant, *Dennison*, for *Tanner*, Birmingham.

Solicitor for the respondent, *E. W. Smith*, Town Clerk of Birmingham.

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QUEEN'S BENCH DIVISION.

Wednesday, May 11, 1892.

(Before DAY and CHARLES, JJ.)

REG. v. THE JUSTICES OF ANGLESEY. (a)

Justices—Practice—Appeal to quarter sessions—Conditions and regulations of appeal—Deposit in lieu of recognisance—Proper court to fix deposit—"Court of summary jurisdiction before whom appellant appears to enter into recognisance"—Meaning of—Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31, sub-sects. 2, 3.

By sect. 31, sub-sect. 2, of the Summary Jurisdiction Act, 1879, an appellant, appealing to a court of quarter sessions from a decision of a court of summary jurisdiction, is required to give within seven days after the decision a notice of appeal in writing, stating the general grounds of appeal; and by sub-sect. 3 the appellant, within three days after notice of appeal, must enter into a recognisance before a court of summary jurisdiction, or the appellant may, if "the court of summary jurisdiction before whom the appellant appears to enter into a recognisance" think it expedient, give such security by way of deposit as "that court deem sufficient."

On the same day on which the decision of a court of summary jurisdiction was given, the appellant gave a verbal notice of appeal, and the Court allowed the appellant to make a deposit in lieu of a recognisance, and fixed the amount of such deposit and three days afterwards the appellant gave a written notice of appeal. The Court of Quarter Sessions declined to hear the

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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appeal on the ground that the regulations of sect. 31 had not been complied with.

Held, that the court which had decided the case, not having had the notice of appeal and the grounds of appeal before it, was not the court of summary jurisdiction which had power to take the recognisance or fix the deposit within sub-sect. 3; and that, as the wrong court had fixed the deposit, the conditions and regulations of the section had not been complied with by the appellant, and that, therefore, the quarter sessions were right in refusing to hear the appeal.

RULE nisi for a *mandamus* calling on the justices of Anglesey to show cause why they should not enter continuances and hear and determine an appeal in an affiliation case, which they had declined to hear.

From the affidavits it appeared that an affiliation summons against the appellant, the applicant for the present rule, came on for hearing at the Petty Sessions Court on the 21st day of March, 1892. The defendant did not give evidence himself, stating that he had been taken by surprise in consequence of the absence of some of his witnesses, and an order was made against the appellant. He at once expressed his determination to appeal against the order, and gave, on the 21st day of March, a verbal notice of appeal to the justices, and he was allowed by the court—the court who had heard the case and made the order—to make a deposit by way of security instead of entering into a recognisance under sub-sect. 3 of sect. 31 of the Summary Jurisdiction Act, 1879, and the court fixed the amount of such deposit at 20*l*. On the 24th day of March the sum of 20*l*. was deposited with the clerk, and on the same day a written notice of appeal was served, which reached the complainant on the following day, the 25th day of March.

When the appeal came on for hearing at the quarter sessions, the justices, upon an objection raised by the complainant, refused to hear the appeal on the ground that the appellant had not observed the conditions and regulations as to recognisances contained in sect. 31, sub-sect. 3, of the Summary Jurisdiction Act, 1879. The appellant then applied to the court to state a case for the opinion of the High Court, and a case was accordingly stated; but the appellant, thinking that he had no right to have a case stated on a preliminary point, abandoned the case, and afterwards obtained the present rule.

Sect. 31 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49) gives a right of appeal to quarter sessions in certain cases from orders of courts of summary jurisdiction, “subject to the conditions and regulations following:—”

Sub-sect. 2. The appellant shall, within the prescribed time, or, if no time is prescribed, within seven days after the day on which the said decision of the court was given, give notice of the appeal by serving on the other party and on the clerk of the said court of summary jurisdiction notice in writing of his intention to appeal, and of the general grounds of such appeal; and

Sub-sect. 3. The appellant shall, within the prescribed time, or if no time is prescribed, within three days after the day on which he gave notice of appeal, enter into a recognisance before a court of summary jurisdiction, with or without a surety or sureties as that court may direct, conditioned to appear at the said sessions and to try such appeal, and to abide the judgment of the Court of Appeal thereon, and to pay such costs as may be awarded by the Court of Appeal; or the appellant may, if the court of summary jurisdiction before whom the appellant appears to enter into a recognisance think it expedient, instead of entering into a recognisance, give such other security, by deposit of money with the clerk of the court of summary jurisdiction or otherwise, as that court deem sufficient.

By sect. 49 :

The expression "prescribed" means prescribed or provided by any Act which relates to any offences, penalties, fines, costs, sums of money, orders, proceedings, or matters, to the punishment, recovery, making or conduct of which the Summary Jurisdiction Acts expressly or impliedly apply or may be applied.

Gore, for the complainant in the case, showed cause against the rule.—I take the preliminary point that, as the defendant had applied for and obtained a special case, and as he had abandoned this case, he cannot now apply for a *mandamus*, and this rule ought to be discharged on that ground: (*Rex v. Justices of the West Riding*, 1 A. & E. 606; *Rex v. Justices of Suffolk*, 6 A. & E. 609.)

Avory in support of the rule.—The Court of Quarter Sessions was wrong in stating a case. They had no power to state a case on a preliminary point, as a case can only be stated when they have heard and determined the matter. The case, therefore, was properly abandoned by the defendants, as it had been applied for and granted under a mistake, and such abandonment does not preclude the defendant from now applying for this *mandamus*: (*Reg. v. The Overseers of Sutton Coldfield*, 29 L. T. Rep. N. S. 840; L. Rep. 9 Q. B. 153.)

Day, J.—I think we had better hear the application.

Objection overruled.

Gore then showed cause.—The objection taken before the Court of Quarter Sessions was, that the appellant had not entered into recognisances as required and provided by sect. 31, sub-sect. 3, of the Summary Jurisdiction Act, 1879. I submit that was a valid objection, and the court was right in giving effect to it and refusing to hear the appeal. Here the deposit was fixed and approved on the 21st day of March, and by the court which had heard and determined the summons on the 21st day of March. The case was decided against the appellant on the 21st, but written notice was not served until the 24th, which reached the complainant on the 25th. Has there, under these circumstances, been a due compliance with the statute? I submit not. Sub-sect. 3 says that the appellant, within three days after giving notice of appeal, is to enter into a recognisance "before a court of summary jurisdiction." In the first place, the entering into the recognisance, or the making of a deposit in lieu of a recognisance, is to be done within three days after giving the notice of appeal; but here the deposit was made on the 21st day of March, and therefore before the notice of appeal.

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was properly given. In the next place, the court before whom the appellant is to appear to enter into a recognisance or make a deposit is not the court which decided the case, for the subsection says that within three days after the giving of the notice of appeal the appellant is to appear before a "court of summary jurisdiction" to enter into his recognisance. This shows that the court which heard the case is not the court of summary jurisdiction before which the appellant is to appear to enter into a recognisance. Moreover, the section goes on to say, "or the appellant may, if the court of summary jurisdiction before whom the appellant appears to enter into a recognisance think it expedient, instead of entering into a recognisance, give such other security as deposit of money . . . as that court deem sufficient." The words "as that court deem sufficient" show that the court who is to judge of the sufficiency of the deposit is the court before whom the appellant is to appear to enter into a recognisance, the court which has before it the notice of appeal and the grounds of appeal, as it is necessary for the court to have before it the grounds of appeal before it can fix what deposit is necessary. In this case the court which fixed the amount of the deposit was the court which decided the case, and not the court before whom the appellant ought to have appeared for the purpose of entering into a recognisance. The conditions and regulations of the section, therefore, were not complied with, and the Court of Quarter Sessions was right in refusing to hear the appeal. This rule ought, therefore, to be discharged.

Avory in support of the rule.—The ground on which the rule was obtained, that the provisions as to days are merely directory, and that the recognisance need only be entered into before the expiration of the required time. On the 21st day of March the court was sitting, and no court would be sitting again till the 28th. Notice of appeal was given on the 24th, and, if the statute is to be construed according to the contention on the other side, then the appellant must have appeared before a court of summary jurisdiction on the 27th; but no court was then sitting, so that, according to that construction of the section, compliance would be impossible. The section says notice of appeal must be given "within seven days;" that means that he may give his notice of appeal either on the spot, or any day within the seven days. The section ought not to be construed that the recognisance must be given three days after notice; it is sufficient if all be done within the required time. [CHARLES, J.—Is not the giving of a recognisance one of those acts which can be done before a single justice?] It is submitted not, as a single justice is not a court of summary jurisdiction. [*Gore* refers to the definition clause of the Act, sect. 50, where a "court of summary jurisdiction" is defined so as to include a single justice.] One justice of the peace cannot take a recognisance if it is such that it must be taken before a court of summary jurisdiction. [CHARLES, J.—One

justice seems to be a court of summary jurisdiction. *Gore*.—The expression “court of summary jurisdiction” is further defined in the Interpretation Act, 1889 (52 & 53 Vict. c. 63, s. 13, sub-sect. 11). CHARLES, J.—That makes it quite clear.] Here the appellant applied to the court, and the court fixed the amount of the deposit at 20*l.*, and this sum was deposited within three days after he had given notice of his intention to appeal, and that sufficiently satisfied the statute. The remaining point is the contention that the court of summary jurisdiction sitting on the 21st was not the court of summary jurisdiction before which the appellant ought to have appeared to enter into a recognisance, and that such court was not the court to fix the amount of the deposit. This was, if anything, merely a defect which the Court of Quarter Sessions could have cured. If the contention on the other side were correct, that the court which hears the case is not the court of summary jurisdiction before whom the recognisance is to be entered into, then the greatest inconvenience might be caused, as, in many parts of the country, courts sit only once a fortnight; so that there would be no court of summary jurisdiction sitting which could fix the amount of the deposit, or take the recognisance within the time fixed by the statute, and this shows that the contention is not well founded. Upon similar words in an earlier Act—the 20 & 21 Vict. c. 43, ss. 2 and 8—there have been two cases decided which are in favour of this contention, the cases of *Chapman v. Robinson* (28 L. J. 30 M. C.) and *Stanhope v. Thorsby* (14 L. T. Rep. N. S. 332; 35 L. J. 182, M. C.) Sect. 3 of that statute provided that the appellant at the time of making his application for a special case—which, by sect. 2 was to be within three days after the decision—should in every instance enter into a recognisance; and it was held in the former case that it was sufficient if he entered into the recognisance at any time within the three days allowed for his application. That case was followed by the later case, where it was held that it was sufficient if within the limit of the time prescribed, though after the three days. Here the deposit was made within the prescribed limit of time, and the recognisance was entered into, or, which is equivalent, the deposit fixed by the only court of summary jurisdiction available had been paid. On these grounds it is submitted that the Court of Quarter Sessions ought to have heard the appeal, and that this rule ought to be made absolute.

DAY, J.—I am of opinion that this rule should be discharged. The statute provides that a recognisance should be given. The appellant has to give notice of appeal within seven days after the decision, and then, by sub-sect. 3 of sect. 31, he has within three days after that to enter into a recognisance before a court of summary jurisdiction. The notice of appeal has to set out the grounds of appeal, and these may be questions of law or of fact and even of complicated facts, which require the production of a number of witnesses; the recognisance is conditioned that the appellant should pay the costs of the appeal. The statute then

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goes on to provide that the appellant may, instead of entering into a recognisance, "give such other security by deposit of money with the clerk of the court of summary jurisdiction or otherwise as 'that court' may deem sufficient." Therefore the court of summary jurisdiction before whom the appellant appears to enter into his recognisance is the court which has to consider what sum has to be deposited, and it is a sum which is to be deemed by that court to be sufficient, and to do this they must have before them the notice of appeal and the grounds of appeal, and they have to consider with the grounds of appeal before them what will be the sum required. It is exceedingly reasonable and exceedingly important that this question of the amount of the deposit should not be disposed of until the court has before them the grounds of appeal. In the present case the notice of appeal was not given until after the deposit had been fixed, so that when they fixed the amount of the deposit the court had no notice of appeal before them, and no knowledge of what the grounds of appeal were, but, notwithstanding that, the court said they would accept a deposit of 20*l*. The appellant never applied before any court of summary jurisdiction to enter into a recognisance, and the court before whom the case was heard was not competent to dispense with the taking of a recognisance. The only court capable of dispensing with the recognisance was the court before whom, under sub-sect. 3, the appellant ought to have entered into a recognisance. When the matter came before the quarter sessions, the same objection which is now taken by Mr. Gore was then taken, that no court of summary jurisdiction had ever considered the question, and the court held the objection fatal, and they declined to hear the appeal when the present rule for a *mandamus* was obtained. For the reasons given it seems to me that this rule should be discharged.

CHARLES, J.—I regret to have to come to the same conclusion, but I must do so on looking at sect. 1, sub-sects. 2 and 3 of the Summary Jurisdiction Act, 1879. If this case had to be decided on the Act 20 & 21 Vict. c. 43, or if it had been merely a case of entering the appeal sooner than was necessary, I might have made this rule absolute, thinking that the appeal ought to have been heard; but, as my brother Day has pointed out, this case is a very different one, because what has taken place here is that the wrong court has fixed the recognisance. As my learned brother has pointed out, the amount to be deposited has not been fixed by the proper court. Looking at the sub-sections, I think that the intention of the Legislature in sub-sect. 3 was that the recognisance should be entered into before a court of summary jurisdiction which had the notice of appeal and the grounds of appeal before them. That has not been so here. I am afraid, therefore, that the cases cited with regard to the times in which the recognisances must be entered into have no application where the wrong court has fixed the security.

Rule discharged.

Solicitors for the prosecutor, *Winter and Co.*, for *D. Owen and Griffith*, Bangor.

Solicitors for the complainant, *Peacock and Goddard*, for *S. R. Dew*, Bangor.

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QUEEN'S BENCH DIVISION.

Monday, Aug. 9, 1892.

(Before Lord COLERIDGE, C.J. and CAVE, J.)

REG. v. BOALER. (a)

Certiorari—Central Criminal Court—Power of High Court to direct writ of certiorari to Central Criminal Court—Indictment—Immaterial averment—Indictment for publishing libel upon directors—Necessity of proving that the directors were properly appointed.

The High Court has no jurisdiction to issue a writ of certiorari, directed to the Central Criminal Court, to remove a conviction obtained in the Central Criminal Court, for the purpose of having the same quashed.

Upon the trial of an indictment for publishing a libel upon the directors of a company, it is not necessary to prove that the prosecutors were the de jure directors of the company, and properly appointed as such, it being admitted that they were the acting directors, and the libel being published upon them as such acting directors, and the averment that they were directors is an immaterial averment.

APPPLICATION by Mr. B. Boaler, the applicant in person, for a rule *nisi* for a writ of *certiorari*, directed to the Central Criminal Court, to bring up a conviction for the purpose of quashing the same.

Mr. Boaler was, some years ago, indicted at the Central Criminal Court for publishing a libel upon the directors of a certain bank. Upon that indictment he was found guilty, and sentenced to a term of imprisonment, which he underwent.

After various proceedings to get this conviction set aside, he now moved for a rule for a *certiorari*, directed to the Central

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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Criminal Court, to remove the conviction obtained in that court for the purpose of having the conviction quashed, upon the ground that the indictment described the prosecutors in the case as directors of the bank, and that he was indicted for publishing a libel upon the directors of the bank, whereas upon the trial it was not proved that these prosecutors were *de jure* directors of the bank. There was no doubt that the prosecutors were the *de jure* directors of the bank, and in fact it was admitted by the applicant at the time that they were the acting directors of the bank, but he now contended that, as he was indicted for publishing a libel upon the directors of the institution, it ought to have been strictly proved that the prosecutors were *de jure* directors of the bank, and properly appointed as such, and that it was not sufficient that it was shown that they were the *de facto* or acting directors, and he argued that the conviction was defective in that respect, and ought to be quashed, and that a writ of *certiorari* could go to the Central Criminal Court for removing the conviction into the High Court to be quashed.

Mr. Boaler, the applicant in person, applied for the rule.

LORD COLERIDGE, C.J.—I think we cannot grant this rule, on two grounds, either of which is sufficient, and both of which make it impossible for us to grant it. First, there is no authority for saying that this writ can go at all to the Central Criminal Court, which is a Superior Court. It is a Court at least as high as the assizes, as the criminal Court on the circuit; and it has been held expressly with regard to those Courts, that no *certiorari* will go to bring up a conviction obtained at the assizes, for the purpose of being quashed here. But, secondly, I do not think there are any merits. The utmost that Mr. Boaler has pointed out to us is, that it may be that there was evidence given, or that there was no evidence given—it does not signify which—that there has been a mistake in respect of an averment that certain persons who were the prosecutors in the case were directors of an institution of which they were the directing board, and that, says he, was not proved, and could not be proved. It seems to me that that was an immaterial averment, because it was quite sufficient to show, as no doubt was shown, that they had acted as such, and although no doubt if, in some civil proceeding, they had been relying upon their character as directors, as justifying what they had done as directors, it might have been material to inquire whether they were in fact directors or not, yet in an indictment it was sufficient to show that they had acted as such. Upon both of these grounds—first, as to whether we have jurisdiction; and, secondly, whether, if we had we should exercise it—we must refuse this application.

CAVE, J.—I am of the same opinion. No instance of a writ of *certiorari* directed to the Central Criminal Court to bring up a conviction to quash it can be found. There is not even that, but there is not any evidence that anything of the kind has been done at quarter sessions; and yet the cases in which men might

have been in the position to allege at all events that there was no evidence to go to a jury upon particular facts alleged in the indictment must have occurred over and over again. Although this jurisdiction would have been one which would have been constantly exercised if it existed, there is no instance of its ever having been exercised except in the case of this very gentleman, which was heard before my brother Mathew and Smith, L.J. on the 24th day of January, 1888, and in which it is admitted the case was decided against him. How the writ came to be issued in that case I do not know. If it had been decided in favour of the present applicant, that would have been a case in point; but, as it was decided against him, it is not an authority which in any respect binds us. Looking at what appears to have been the practice during all ages of not allowing a *certiorari* to go either to the Central Criminal Court, or to the assizes, or to the quarter sessions, simply upon the allegation that an immaterial averment appearing in the indictment had not been proved, that is to say, that there was no evidence laid before the jury upon which they could find that averment proved—that there is no such writ known to have been issued in such a case, to my mind, is quite sufficient to show that this Court has no jurisdiction to grant such a writ. Then in this case the point alleged not to have been proved is that these gentlemen were *de jure* directors of the company. The libel was published upon them as acting directors of the company, and after that it is perfectly immaterial whether they were directors or whether they were not. If the libel had been that they were not directors, and the allegation had been that he had falsely and maliciously alleged that they were not directors when they were, that might have been another thing, although it would not have affected our judgment. But here all it was necessary to show, and that was shown by the defendant's admission contained in the letter, was that they were acting as directors. The libel was written about them as acting in that capacity, and whether they were appointed *de jure*, or were simply acting *de facto*, was quite immaterial.

Application refused.

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QUEEN'S BENCH DIVISION.

Friday, May 27, 1892.

(Before MATHEW and WRIGHT, JJ.)

REG. v. BAYARD. (a)

Practice — Costs — Certiorari — Removal of indictment — Recognisance — Indictment — Several counts — Conviction on some counts, acquittal on others — Taxation of costs — “Acquitted upon the indictment” within meaning of recognisance — 16 & 17 Vict. c. 30, s. 5.

Defendant was indicted at quarter sessions upon one indictment containing several counts, charging various misdemeanours. The indictment was removed by certiorari, the prosecutors and sureties being bound over in recognisances, under 16 & 17 Vict. c. 30, s. 5, upon condition to pay the said defendant's costs incurred subsequently to the removal of such indictment.

There were seven counts in the indictment. The defendant was acquitted on five counts and found guilty on the two remaining counts. The defendant obtained a rule nisi, calling on the prosecutors to show cause why defendant's costs should not be taxed, the defendant having been acquitted on five out of seven counts in the indictment, the condition of the recognisance being in the terms of 16 & 17 Vict. c. 30, s. 5, viz., that the prosecutor should pay the defendant “in case he or they shall be acquitted” his or their costs incurred subsequently to the removal of the indictment :—

Held, that the defendant had not been acquitted upon the indictment, within the condition of the recognisance, and therefore the defendant was not entitled to have the costs taxed.

A RULE nisi was obtained by the defendant calling on the prosecutors to show cause why the defendant's costs incurred subsequently to the removal of an indictment should not be referred to one of the masters of the Crown Office, to tax the costs to be paid by the prosecutors to the defendant in respect of the 3rd, 4th, 5th, 6th, and 7th counts of an indictment.

The 1st and 2nd counts of the indictment charged the defendant with narrowing and obstructing a highway by maintaining a wire fence. The 3rd count charged that certain persons had obstructed another highway by erecting a fence and planting

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

grass and trees, and that the defendant continued the obstructions. The 4th, 5th, 6th, and 7th counts charged the defendant with obstructing a highway by maintaining a fence and a building and a pond which had been deepened.

A writ of *certiorari* was obtained by the prosecutors to remove the indictment into the High Court of Justice, the prosecutors having entered into a recognisance upon the condition that, if the defendant should be acquitted upon the indictment, they (the prosecutors) should pay to the defendant all the costs incurred subsequent to the removal of the indictment, and that the recognisance should then be void.

The defendant was tried at the summer assizes for Montgomeryshire in 1891, when the jury found a verdict of guilty on the 1st, 2nd, and 3rd counts of the indictment, and not guilty on the 4th, 5th, 6th, and 7th counts. The verdict on the 3rd count was set aside, and a new trial ordered as to the offence charged in that count.

On the second trial the defendant was acquitted.

The defendant's solicitors applied at the Crown Office, under rule 252 of the Crown Office Rules, 1886, for an order to tax the defendant's costs on the 3rd, 4th, 5th, 6th, and 7th counts of the indictment incurred subsequently to the removal by *certiorari*. An order was refused, on the ground that the defendant had not been acquitted upon the indictment so as to be entitled to costs.

The defendant then applied for and obtained a rule *nisi*.

By 16 & 17 Vict. c. 30, s. 5, it is enacted as follows :

And whereas it is expedient to make further provision for preventing the vexatious removal of indictments into the Court of Queen's Bench : Be it enacted that whenever any writ of *certiorari* to remove an indictment into the said court shall be awarded at the instance of a defendant or defendants, the recognisance now by law required to be entered into before the allowance of such writ shall contain the further provision following; that is to say, that the defendant or defendants, in case he or they shall be convicted, shall pay to the prosecutor his costs incurred subsequent to the removal of such indictment; and whenever such writ of *certiorari* shall be awarded at the instance of the prosecutor, the said prosecutor shall enter into a recognisance (to be acknowledged in like manner as is now required in cases of writs of *certiorari* awarded at the instance of the defendant) with the condition following; that is to say, that the prosecutor shall pay to the defendant or defendants, in case he or they shall be acquitted, his or their costs incurred subsequent to such removal.

Rule 30 of the Crown Office Rules, 1886, has similar provisions relating to the removal of an indictment by *certiorari*.

Loehnis, for the prosecutors, showed cause against the rule.—The defendant has no right to have these costs taxed. The defendant cannot be considered to have been acquitted. The defendant was convicted upon the indictment. Until 16 & 17 Vict. c. 30, there was no power to make prosecutor pay costs. The right to costs has only been acquired by this statute. The recognisance was entered into under sect. 5 of the statute, and, in order to entitle the defendant to have costs, the condition of the recognisance must be fulfilled. The condition of the

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recognisance is that set out in the latter part of sect. 5 of the statute, viz., "that the prosecutors shall pay to the defendant or defendants, in case he or they shall be acquitted, his or their costs incurred subsequent to such removal." He cited *Rex v. Downes* (1 T. R. 453); *Rex v. Fieldhouse* (1 Cowp. 325); *Reg. v. Hawdon* (11 A. & E. 143); *Reg. v. Inhabitants of East Stoke* (6 B. & S. 536; 34 L. J. 190, M. C.).

F. Marshall, for the defendant, in support of the rule.—The counts or charges in the indictment are separable. If they were held not to be separable a vindictive prosecutor might be able to deprive a defendant of the costs of an expensive prosecution by merely joining a very trivial count to several others in the same indictment. There might well have been several indictments here, instead of several counts in the same indictment. The defendant having been acquitted on five out of seven counts in the indictment, charging several distinct offences, the rule only asks for costs in respect of the five counts on which the defendant was acquitted. The word of sect. 5 in 16 & 17 Vict. c. 30, are "in case he or they shall be acquitted" the prosecutor shall pay his or their costs incurred subsequently to the removal by *certiorari*: (*Myers v. Defries*; *Siddons v. Lawrence*, 40 L. T. Rep. N. S. 795; 4 Q. B. Div. 100; 4 Ex. Div. 176; 48 L. J. 445, Ex.; *Castro v. The Queen*, 43 L. T. Rep. N. S. 78; 5 Q. B. Div. 490; 49 L. J. 747, Q. B.; 44 L. T. Rep. N. S. 350; 6 H. of L. Cas. 229; 50 L. J. 497, Q. B.)

MATHEW, J.—This rule must be discharged. An attempt is now made for the first time, contrary to the practice of the Crown Office, to introduce the rules applicable to the civil procedure into that of the criminal law. The power to tax costs in cases where an indictment has been removed by *certiorari* depends partly on the statute and partly upon the recognisance. The 5th section of 16 & 17 Vict. c. 30, provides that where a writ of *certiorari* shall be awarded at the instance of the prosecutor, the prosecutor shall enter into a recognisance with the condition that the prosecutor shall pay to the defendant, in case he shall be acquitted, his costs incurred subsequently to the removal. I am far from saying that the court may not have a discretion, in cases where an application is made for a *certiorari*, to make a special order with regard to the costs of a particular prosecution; but that is not the question in this case. In the present case a recognisance has been entered into by the prosecutors with the condition that the prosecutors should pay to the defendant, in case the defendant should be acquitted upon the indictment, the costs incurred subsequently to the removal of such indictment. That means, acquitted of all the misdemeanours charged in the indictment.

WRIGHT, J.—I am of the same opinion, and for the same reasons; and I rely especially upon the fact that the practice of the Crown Office hitherto has been uniform in not taking separate issues.

Solicitors for the defendant applying for the rule, *Robbins, Billing, and Co.*, agents for *Williams, Gittins, and Taylor*, Newtown, Wales.

Solicitors for the prosecution, against the rule, *Rowcliffes, Rawle, and Co.*, agents for *G. D. Harrison*, Welchpool.

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QUEEN'S BENCH DIVISION.

Dec. 2 and 3, 1891.

(Before Lord COLERIDGE, C.J. and WRIGHT, J.)

REG. v. BAKER AND ANOTHER (Justices) AND CLARKE. (a)

Medical practitioner—Registered Licentiate of Society of Apothecaries, 1885—Pretending to be M.D., physician, or surgeon—Medical Act, 1858 (21 & 22 Vict. c. 90), s. 40.

A medical practitioner registered as Licentiate of Soc. Apoth. Lond. 1885, but not qualified to be registered as M.D., physician, or surgeon, under the Medical Act, 1858, placed "M.D." after his name on vaccination certificates, and in other ways described himself to the public as M.D., and as "physician" and "surgeon," in some cases with the further addition of "legally registered practitioner":—

Held, that he could be convicted of wilfully and falsely pretending to be a doctor of medicine, physician, and surgeon, contrary to sect. 40 of the Medical Act, 1858.

RULE nisi calling upon Alfred Baker and Edwin Henry Stringer, Esqs., two of Her Majesty's justices of the peace for the county of Warwick, and Charles Clarke, to show cause why a writ of *certiorari* should not issue to remove into the Queen's Bench Division three several records of convictions under the hands and seals of the said two justices dated on or about the 28th day of April, 1891, whereby Samuel Edwin Lambert Smith was convicted (a) for unlawfully, wilfully, and falsely using the title of doctor of medicine; (b) for unlawfully, wilfully, and falsely using the title of physician; (c) for unlawfully, wilfully, and falsely using the title of surgeon; and why the said convictions should not be quashed, when returned, on the grounds (1) that the magi-

(a) Reported by *MERVYN LL. PHIL*, Esq., Barrister-at-Law.

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strates had no jurisdiction to convict, after the registration of the defendant had been proved; (2) that the convictions were bad on the face of them, as disclosing no offence under the Medical Act, 1858.

It appeared from an affidavit of the justices that the said Samuel Edwin Lambert Smith was convicted of the three several offences above stated, by the said justices sitting in petty sessions, at Aston, in the county of Warwick, on the 28th day of April, 1891, upon three summonses on the information of Charles Clarke, under sect. 40 of the Medical Act, 1858 (21 & 22 Vict. c. 90).

At the hearing of the said summonses the following facts were either proved or admitted:—The defendant, the said Samuel Edwin Lambert Smith, was a registered licentiate of the Society of Apothecaries, his name appearing in the Medical Register for 1891 as "Lic. Soc. Apoth. Lond. 1885." He had filled up and signed vaccination certificates, placing the letters "M. D." after his name, and had given the informant Charles Clarke, at his request, a certificate in duplicate of being too ill to work, in which he signed himself as "M. D." and had appended a similar signature to a testimonial for the purpose of an advertisement of coca wine. In some cases the defendant had added the words "legally registered practitioner" to the letters "M.D." Over the door of the defendant's surgery in large letters were the words "Dr. Smith's Branch Surgery," and over the window, "Dr. Smith, Physician and Surgeon. Surgery hours: morning, 10.0 to 12.0; afternoon, 3.0 to 4.0. Vaccination daily." On the wall to the right of the window were the words, "Dr. Smith, Surgeon." On the wall outside the defendant's house was a brass plate inscribed, "S. E. L. Smith, M.D., Physician and Surgeon, &c." There was also a brass plate on the outer entrance door inscribed, "Dr. Smith, Surgeon, &c.," and the same words were painted over a fanlight above the door. On the inner vestibule door was another brass plate inscribed "Mr. S. E. L. Smith, Surgeon, &c." For the defence a document was produced purporting to be a diploma of "The Beach Medical Institute, Indianapolis, U.S. America," and to confer upon the defendant the degree of doctor of medicine.

The Medical Act, 1858 (21 & 22 Vict. c. 90), an Act to regulate the qualification of practitioners in medicine and surgery, after reciting that "it is expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners," provides for the establishment of a "General Council of Medical Education and Registration of the United Kingdom," with branch councils for England, Scotland, and Ireland, and for the appointment of registrars and other officers.

By sect. 31, every person registered under the Act shall be entitled according to his qualification or qualifications to practise medicine or surgery, or medicine and surgery, as the case may be, in any part of Her Majesty's dominions.

By sect. 15, every person possessed at the time of the passing

of the Act, and (subject to the provisions thereafter contained) every person thereafter becoming possessed of any one or more of the qualifications described in the schedule A. to the Act, shall on payment of a fee . . . be entitled to be registered.

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Schedule A. is as follows :

1. Fellow, licentiate, or extra licentiate of the Royal College of Physicians of London.
2. Fellow or licentiate of the Royal College of Physicians of Edinburgh.
3. Fellow or licentiate of the King's or Queen's College of Physicians of Ireland.
4. Fellow or member, or licentiate in midwifery, of the Royal College of Surgeons of England.
5. Fellow or licentiate of the Royal College of Surgeons of Edinburgh.
6. Fellow or licentiate of the faculty of physicians and surgeons of Glasgow.
7. Fellow or licentiate of the Royal College of Surgeons in Ireland.
8. Licentiate of the Society of Apothecaries, London.
9. Licentiate of the Apothecaries Hall, Dublin.
10. Doctor, or bachelor, or licentiate of medicine, or master in surgery of any university of the United Kingdom, or doctor of medicine by doctorate granted prior to the passing of this Act by the Archbishop of Canterbury.
11. Doctor of medicine of any foreign or colonial university or college, practising as a physician in the United Kingdom before the 1st day of October, 1858, who shall produce certificates to the satisfaction of the council of his having taken his degree of doctor of medicine after regular examination, or who shall satisfy the council under sect. 46 of this Act that there is sufficient reason for admitting him to be registered.

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Sect. 40 provides as follows :

Any person who shall wilfully and falsely pretend to be, or take, or use the name or title of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner, or apothecary, or any name, title, addition, or description, implying that he is registered under this Act, or that he is recognised by law as a physician, or surgeon, or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary, shall upon a summary conviction for any such offence pay a sum not exceeding 20/.

Muir Mackenzie, for the magistrates and the British Medical Council, against the rule.—The magistrates had jurisdiction to convict the defendant upon each of these summonses. There is nothing in the evidence to show that they could not convict ; for, if a person registered in respect of one qualification describes himself as if he was registered or entitled to be registered under another qualification, as the defendant undoubtedly did here, the offence is committed, and he must suffer the penalty. The alleged American diploma is no defence, even if genuine, because the Medical Act, 1858 allows, subject to certain conditions, a foreign or colonial degree of M.D. to be a qualification for registration only in the case of a person possessing that degree, and practising as a physician in the United Kingdom at the time when the Act was passed. The defendant in this case has none of the qualifications required by the Act to entitle him to be registered as M.D., physician, or surgeon. Clearly, therefore, the evidence shows that he has wilfully and falsely used each and all of these titles for the purpose of medical practice in a manner likely to deceive the public. The offence is therefore made out in each case. The magistrates had jurisdiction, and the convictions on the face of them are clearly good. He cited or referred to *Ellis*

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Harris, Q.C. (*R. J. Hodgson* with him) in support of the rule.

—The registration of the defendant having been proved, there was no offence committed under sect. 40, and the magistrates had no jurisdiction to convict. It is contended that, when once a person is registered under the Act in respect of any qualification, he may call himself what he likes. If he is registered as the defendant is here, as a licentiate of the Society of Apothecaries, London, he may describe himself as “M.D.,” or as “physician,” or as “surgeon,” without committing any offence under sect. 40. [Lord COLERIDGE, C.J.—He is only registered as a licensed apothecary. If he puts “M.D.” after his name, does he not falsely pretend to be a doctor of medicine? If not, then the Act is a powerful instrument of mischief.] It may be a defect in the Act, but being registered under any one qualification, he is entitled to practise under and call himself by any other. [WRIGHT, J.—The Act clearly prohibits a licensed apothecary calling himself a physician or surgeon.] The contrary is submitted, if he is registered. The reported cases appear to differ, and to be inconsistent. In *Ellis v. Kelly* (*ubi sup.*), as reported in 6 H. & N. 222, Pollock, C.B. says, in the course of the argument, that if a medical practitioner is registered, he may call himself what he pleases. [Lord COLERIDGE, C.J.—I think the reports can be reconciled, and that they are quite inconsistent with the contention that a man registered as one kind of practitioner may describe himself as another. The general scope of the Act is to protect the public against the fraud and deception of persons falsely describing themselves as physicians or surgeons. The object of the Act is, that medical practitioners shall be duly qualified and registered.] A licensed apothecary is duly qualified, and is entitled to be registered. It is submitted that, being registered under the Act, the defendant has committed no offence against sect. 40 ; therefore these convictions are bad, and the rule should be made absolute.

Lord COLERIDGE, C.J.—This was a rule directed to the justices of Warwickshire, calling on them to show cause why a writ of *certiorari* should not issue, to bring up three convictions for the purpose of quashing them. They were convictions of a gentleman named Smith, who in a great many cases had signed documents with his proper name, and had put up his name at his house and surgery, placing after it the letters “M.D.” and sometimes the words “physician and surgeon,” and “surgeon ;” in some cases with the further addition of “legally registered practitioner.” That is what he did, and it is admitted that he claims a right to do so. He is a man who is registered under the Medical Act, 1858, and the question is whether he is a person who comes within the meaning of the 40th section of that Act, on which this conviction proceeded, and which we have now to

construe. Now he is registered, and no doubt correctly, under the Act, as a licentiate of the Society of Apothecaries, which would make him, in the common phrase, an apothecary; and being registered as such under the Act he has not signed or posted up his name as a licentiate of the Apothecaries Company, but as "M.D." and as "physician and surgeon." Now he says he is in possession of a degree of "M.D.," not of any of the universities mentioned in the Act, but of some institute at Indianapolis, in America. If he were not claiming to practise and to take privileges under the Act, he would have a perfect right to put "M.D." after his name, and it would not be necessary for him to add anything to show that it was not a degree conferred by Edinburgh, London, Dublin, or any other place but Indianapolis. But he has put "M.D." and "physician" and "surgeon" after his name, to give the impression, so it is said, that he is an M.D., or a physician or surgeon of one of the universities or colleges mentioned in the Act. Those are the facts. A man who is an American M.D., and licensed by the Apothecaries Company of England, and registered as such under the Medical Act 1858, puts after his name "M.D." and "physician and surgeon," and "legally registered practitioner." The question is, has he broken this Act of Parliament? He clearly is not an M.D. under the Act, although he is an M.D. in America. Now sect. 40 of the Act says: "Any person who shall wilfully and falsely pretend to be, or take or use the name or title of a physician, doctor of medicine, . . . surgeon, . . . or any name, title, addition or description implying that he is registered under this Act, or that he is recognised by law as a physician, or surgeon, shall on summary conviction" be liable to a penalty. It is plain that this gentleman has pretended to be a doctor of medicine, because he has put after his name "M.D.," by which I understand everybody to mean doctor of medicine, and he has stated that he is a practitioner under the Act, therefore anybody looking at his signature would assume that, being registered, he was registered as M.D. Now the argument of Mr. Harris, driven to its conclusion, resulted in this, that a man registered under the Act as having one qualification may claim any other qualification mentioned in the 40th section without incurring the penalty. Now I must say myself, I think that a perfectly monstrous contention. It is obvious that there are different qualifications and examinations for the different heads of medical practice, and that those to which a doctor of medicine must be subject and upon which he must enter are quite different from those required for an apothecary; and that calling yourself a physician because you are an apothecary is a fraud upon the public, and the very thing that this Act of Parliament was intended to prevent. It was intended by the Legislature that persons who employ a medical practitioner should know what sort of examinations he has passed, and under which of the various heads of medical practice he is to be classed. A person,

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who may be an excellent doctor of medicine, may be an absolutely incompetent surgeon, and if he put surgeon after his name when he was M.D. only, he would be misleading people; and that is a thing this Act of Parliament was intended to prevent. In my view of the construction of the Act the magistrates had jurisdiction to convict this gentleman, and we have an authority in the neatest and shortest possible form in the judgment of the present Lord Bramwell in the case of *Ellis v. Kelly (ubi sup.)*, decided by a very full court in the year 1860. The court was unanimous upon the point, and the sentence of Lord Bramwell upon which I rely, is this; he says: "The question depends upon the construction of sect. 40 of the Medical Act, 1858. That section is intended to protect the public from being imposed upon by persons untruly representing themselves to be legally qualified medical men. It appears to me that, on the true construction of that section, if any person wilfully and falsely called himself M.D. he would be liable to a penalty, though he was in reality a member of the College of Surgeons, or of the Apothecaries Company, and was so registered." A more exact and apposite description of the case here, although it was delivered in 1860, I cannot very well conceive. Besides the authority of Bramwell, B., there is my own view of the very clear construction of the statute. I am of opinion that this rule must be discharged.

WRIGHT, J.—I am of the same opinion.

Rule discharged.

Solicitors: in support of the rule, *Pridham* and *De Gez*; for the British Medical Council, *Warren*, *Gardner*, and *Murton*; for the justices, *Stibbard*, *Gibson*, and *Co.*, for *Rowlands* and *Co.*, Birmingham.

QUEEN'S BENCH DIVISION.

Nov. 7 and 11, 1892.

(Before POLLOCK, B. and HAWKINS, J.)

ROBERTSON AND ANOTHER (apps.) v. JOHNSON (resp.) (a)

Fishery Acts—Oysters—Close time—Taken in foreign waters—Relaid in English waters—Storage—Fisheries (Oyster, Crab, and Lobster) Act, 1877 (40 & 41 Vict. c. 42), s. 4.

The Fisheries (Oyster, Crab, and Lobster) Act, 1877, enacts by

(a) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

sect. 4 that a person shall not sell any oysters known in the trade as "deep sea oysters" between the 15th day of June in any year and the following 4th day of August; or any description of oysters other than those aforesaid between the 14th day of May in any year and the following 4th day of August. Every person who acts in contravention of this section shall be liable to a fine Provided that a person shall not be guilty of an offence under this section if he satisfies the Court that the oysters alleged to have been sold were taken within the waters of some foreign State.

The appellants were convicted under the above section for having sold certain oysters on the 4th day of July. The oysters had been imported from France and laid in a creek of the river Medway, where they remained for some four months until the appellants required them for sale:—

Held, that the conviction was bad, as the oysters were taken within the waters of a foreign State, and were only stored in English waters until they were required for use.

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THIS was a case stated by one of the Aldermen of the city of London, sitting as a court of summary jurisdiction, on the application of the appellants, who were dissatisfied with his determination as being erroneous in point of law, as hereinafter stated.

At the Mansion House Justice-room, in the city of London, an information was preferred by Arthur Johnson (hereinafter called the respondent) for and on behalf of the Fishmongers Company under the statute 40 & 41 Vict. c. 42, s. 4, against Robert Myllis McKenzie Robertson (trading as Hole and Dodd) and Ernest John Eason (hereinafter called the appellants) and against one Henry Eason, charging for that they on the 4th day of July, 1892, in the city of London, did unlawfully sell 100 oysters, contrary to the statute, &c., which information was there heard and determined on the 5th day of August, 1892, and upon such hearing the court convicted the said appellants, and adjudged them to pay the said R. M. M. Robertson the sum of 2*l.* 2*s.* for costs, and the said Ernest John Eason the sum of 10*s.* The information against the said Henry Eason was dismissed, there being no evidence that he sold or assisted at the sale of the said oysters.

Upon the hearing of the said information the following facts were either proved or admitted:

That on the 4th day of July, 1892, during the period of close time provided by the Fisheries (Oyster, Crab, and Lobster) Act, 1877 (40 & 41 Vict. c. 42), the appellant, Ernest John Eason (who is an assistant to the appellant Robertson) sold at the shop of the said Robertson, at 120, Pudding-lane, in the said city of London, 100 oysters for the sum of 7*s.* to one George Alfred Hammond, a fish-meter of the Fishmongers' Company, who had asked for French oysters relaid at Stangate Creek, in the Medway. That the said Robertson was one of the proprietors of

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the business carried on at 120, Pudding-lane aforesaid, and was responsible for the sale of the said 100 oysters. That these oysters were not "Deep Sea Oysters," but were French oysters, relaid at Stangate Creek in the river Medway. That the said 100 oysters so sold by the said appellants were opened, and that one of them was dead, nine were spawning, fifty-seven had just spawned, and the remaining thirty-three were in fair condition. That foreign oysters differ from English oysters, but the French oyster is the most like the English oyster in appearance and size. That it is a practice to bring over French oysters in February or March, before the hot weather begins, and relay them in the water on a muddy bottom at some fathoms deep at Stangate Creek aforesaid. That the said 100 oysters so sold were a portion of those brought over from France in February or March, and so deposited at Stangate Creek, and that they were mature oysters. That the oysters so brought from France were laid with due care from a boat, and were placed in a particular part of the beds called "The Shade." This part was entirely empty of oysters at the beginning of February last, and in it no oysters but matured French oysters imported in February or March were placed. The oysters so placed in the "Shade" were beached off from other parts of the grounds occupied by the appellant Robertson, from which they were re-dredged by the appellant Robertson's servants and sent to his London shops at Pudding-lane aforesaid, as and when they were required for sale there. That these oysters are brought over in a mature state, and are practically fully grown, and if used at the time they were imported would have been fit for food. It was proved that the oysters so brought were nurtured at the said beds, and that if they were not placed and nurtured there they would not live. That the nurture of these oysters is derived from the water and natural causes, and is not effected artificially. That French oysters relaid in the waters at Stangate Creek both grow larger and "spat" and spawn, but that such spat or spawn is unproductive, and that matured oysters cannot be reared from the spat of imported French oysters. At Stangate Creek no cultivation of the spawn of French oysters takes place, and there is no recognised bed or bank.

It was contended by counsel on behalf of the appellants that they had committed no offence against the statute in question, as the oysters came within the first proviso of the fourth section, viz., that they were "taken within the waters of some foreign state," to wit, the Republic of France; that the meaning of those words was, that the oysters should be dredged and taken within the waters of some State outside the jurisdiction of the said Act, and that the oysters not allowed to be sold in close time are English oysters taken within the jurisdiction of the said statute; that these oysters were originally "taken" in French waters, and were merely relaid in English waters at Stangate Creek, such waters being used merely as a warehouse for storing the oysters, which can only be kept in water.

That oysters cannot be imported in the summer time direct from the foreign state; that they would die; they are therefore imported in cold weather and put into the beds at Stangate Creek to keep for sale during the close time of English grown oysters, and that such relaying for the purpose of storage is not a bedding of the oyster for the purpose of reproduction.

That the statute was passed to provide a close time for English oysters, and to prevent English oyster beds from becoming impoverished, and that the words "taken within" referred to the original act of dredging from the oyster beds wherein the oysters exempted from sect. 4 had been cultivated, and had grown from spat to maturity.

The appellants by their counsel referred to the case of *Guyer v. The Queen* (60 L. T. Rep. N. S. 824; 23 Q. B. Div. 100), which was a case under the Game Act (1 & 2 Will. 4, c. 32), as being a case under a statute which he considered had an exactly similar purpose to that of the Fisheries (Oyster, Crab, and Lobster) Act, 1877.

It was contended by the Solicitor of the Fishmongers Company, who appeared for the respondent, that the Fisheries (Oyster, Crab, and Lobster) Act, 1877, was passed in consequence of the report from the Select Committee on Oyster Fisheries, which together with the proceedings of committee, minutes of evidence, appendix, and index ordered by the House of Commons to be printed on the 7th day of July, 1876 (which was referred to by counsel for the appellants and the solicitor of the Fishmongers' Company for the respondent), may be referred to in the argument of this case.

The Court was of opinion that the case of *Guyer v. The Queen* (*ubi sup.*), above quoted, was not in point, the game having been killed in the country from whence it was brought, and sold in this country in the same condition as it left the foreign state.

That the oysters relaid in beds so described were alive when brought into this country, and that, while lying in English waters of four months or thereabouts, they materially changed in their condition, and could not be treated as the same oysters as if they had been sold within a reasonable period of their being brought from foreign waters and without the opportunity of such change taking place.

That the said appellants had not satisfied the Court that the said 100 oysters so sold as aforesaid were within the meaning of the statute "taken within the waters of some foreign state."

The Court was also of opinion that the oysters having been relaid in English waters had so changed their condition as to render them to a large extent not suitable for human food, as nine were spawning, fifty-seven had spawned, and thirty-three only were in fair condition.

Finally, the Court was of opinion that the statute was passed not only to provide a close time for English oysters, but to

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prevent oysters being consumed at a period when they were not in an edible condition, and that the words "taken within the waters of some foreign state" meant taken for the purpose of as early consumption as the time of transit and sale would permit, and the Court therefore convicted the said appellants as aforesaid.

The question upon which the opinion of this Court is desired is : Whether the said alderman upon the above statement of facts came to a correct determination and decision in point of law, and if not what should be done in the premises.

The Fisheries (Oyster, Crab, and Lobster) Act, 1877 (40 & 41 Vict. c. 42) provides :

Sect. 4. A person shall not sell, expose for sale, consign for sale or buy for sale : (1) any oysters known at the passing of this Act as "deep sea oysters" between the fifteenth day of June in any year and the following fourth day of August ; or (2) any description of oysters other than those aforesaid, between the fourteenth day of May in any year, and the following fourth day of August.

Every person who acts in contravention of this section shall be liable to a fine not exceeding two pounds for the first offence, and ten pounds for the second or any subsequent offence, and also to forfeit all oysters exposed for sale, consigned for sale, or bought for sale in contravention of this section : Provided that a person shall not be guilty of an offence under this section if he satisfies the court that the oysters alleged to have been sold, exposed for sale, consigned for sale, or bought for sale,—(1) were taken within the waters of some foreign state.

Finlay, Q.C. (C. Matthews with him) for the appellants.—It is submitted that the magistrate was wrong in convicting the appellants. He has evidently been influenced by the fact that some of the oysters were unfit for human food, but that has nothing to do with the present case. These oysters were brought over from France, and placed in the shallow water at Stangate creek, merely for the purpose of storing them until they were required. The statute was passed to protect the English fisheries, and specially excepts oysters taken from the waters of foreign states. If the view of the magistrate is right, no oysters at all can be sold in this country during the close season. It has been held that the Game Act, 1831, does not apply to game killed in a foreign state, and it is submitted that the same argument applies in this case : (*Guyer v. The Queen*, 60 L. T. Rep. N. S. 824 ; 23 Q. B. Div. 100.)

Poland, Q.C. (Travers Humphreys with him) for the respondent.—The question is whether these oysters were taken within the waters of a foreign state. It is admitted that in the first instance they were, but they were subsequently so dealt with that they were in July taken from English waters. These oysters were placed on the beds in Stangate Creek not only for storage, but in order that they might be cultivated and nourished. If they had been kept in tubs and not put on the beds they might have been sold with impunity. It is a question of degree ; and as these oysters were placed in tidal waters, it is submitted that they became English oysters.

Finlay in reply.—This bed is used only for storing these oysters, which do not breed there.

Nov. 11.—**POLLOCK, B.**—This was an appeal from a conviction by one of the Aldermen of the city of London, who stated a case for the opinion of this Court. The magistrate convicted the appellants upon an information which charged that they did unlawfully sell 100 oysters contrary to the statute, &c. Now, the statute is the Fisheries (Oyster, Crab, and Lobster) Act, 1877 (40 & 41 Vict. c. 42), and it provides by sect. 4 that a person shall not sell, expose for sale, consign for sale, or buy for sale (1) any oysters known at the passing of this Act in the oyster trade as “deep-sea oysters” between the 15th day of June in any year and the following 4th day of August; or (2) any description of oysters other than those aforesaid, between the 14th day of May and the following 4th day of August. Then there follows a clause under which a penalty can be inflicted upon anyone acting in contravention of the section, and also a proviso which enacts that a person shall not be guilty of an offence under this section if he satisfies the court that the oysters alleged to have been sold, exposed for sale, consigned for sale, or bought for sale, were taken within the waters of some foreign State. Now, the magistrate in this case has found as facts that the appellant did sell 100 oysters in the city of London on the 4th day of July, 1892; that the oysters were not “deep-sea oysters,” but were French oysters relaid at Stangate Creek in the river Medway; that when they were opened one of them was dead, nine were spawning, fifty-seven had just spawned, and the remaining thirty-three were in fair condition; that foreign oysters differ from English oysters, but that the French oyster is most like the English oyster in appearance and size; that these oysters were brought over in a mature state, and were practically fully grown, and if they had been used at the time they were imported would have been fit for food; that the nurture of these oysters was derived from the water and natural causes, and was not effected artificially. Then, after stating what the contention on either side was, the magistrate further finds that the oysters relaid in beds, as described, were alive when brought into this country, and that while lying in English waters for four months or thereabouts they materially changed in their condition, and could not be treated as the same oysters as if they had been sold within a reasonable period of their being brought from foreign waters, and without the opportunity of such change taking place; that the appellants had not satisfied him that the 100 oysters so sold as aforesaid were taken within the meaning of the statute within the waters of some foreign State. He then goes on further to find that the oysters having been relaid in English waters had so changed their condition as to render them to a large extent not suitable for human food. Now, with regard to that finding, it seems to me to be quite immaterial to the question raised by the case, but it also appears that the mind of the magistrate was influenced by the fact that some of the oysters were not fit for human food. The Act with which we have to deal has no reference to the question

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whether the oysters were fit for human food, though there are other Acts which deal with that point. That finding probably led the magistrate to come to the conclusion at which he arrived. Then the case goes on to state that the Court shall have power to refer to the report of the Committee of the House of Commons on Oyster Fisheries. That report of course does not assist us to interpret the words of the Act which was passed in consequence of the report, but it is very properly referred to because it gives a history of the trade of importing oysters from foreign States, and it appears therefrom that for some years before the passing of this Act there was a very large *bonâ fide* trade in foreign oysters. Now, the statute in question is meant to deal with fisheries, for it is entitled "An Act to Amend the Law relating to the Fisheries of Oysters, Crabs, and Lobsters, and other Sea Fisheries," and does not mean merely to deal with oysters, crabs, and lobsters caught in any particular place, but to preserve them in the fishing grounds around the coast of this country. I am clearly of opinion that the oysters in this case come within the proviso in sect. 4 and were taken, within the meaning of the Act, within the waters of a foreign State. A somewhat similar case was dealt with in *Guyer v. The Queen* (16 Cox C. C. 657; 60 L. T. Rep. N. S. 824; 23 Q. B. Div. 100); in that case the subject-matter dealt with was dead partridges, imported from abroad and sold in this country, and which were never alive here; and it was held that the Game Act, 1831, which prohibits a person licensed to deal in game from having in his shop game during the close season did not apply to birds killed abroad. Hawkins, J. in his judgment, in that case said: "It seems to us that it might well be contended that a partridge which never was alive in England, but was bred and killed in Russia, cannot be truly said ever to have been an English bird of game within the contemplation of an Act of Parliament, which, so far as regards the killing or taking of game birds out of season, could only refer to birds killed or taken on English ground, and as regards the traffic in game out of the prescribed season, must be intended to refer to such birds only as are protected by the close season." It seems to me that the same argument applies to the oysters in this case, and the question which we have to decide is, as I have said, whether they were "taken" within the waters of some foreign State or whether they were "taken" when they were removed from Stangate Creek. If they were very small oysters and were placed in Stangate Creek so that they might be nurtured there they might come within the second category; but the Act clearly does not apply to oysters which are kept in a tub for a few days nor, do I think, does it apply to oysters that are placed as these were in a place such as Stangate Creek for a short time for the purpose of storing them. It seems to me to be all a question of degree. I am therefore of opinion that the conviction in this case must be quashed.

HAWKINS, J.—I am of the same opinion. The intention of

the Legislature in passing this Act was evidently to create a close time, during which oysters should not be taken from English fisheries, and it was not dealing, as indeed it has no power to deal, with the question of taking oysters within the waters of foreign states. The sole question which we have to decide is, whether these oysters were taken within the waters of a foreign state, within the meaning of the proviso in sect. 4 of the Fisheries (Oyster, Crab, and Lobster) Act, 1877. After carefully considering this question, I have come to the conclusion that these oysters cannot be considered as being taken in an English fishery, but that they are for all intents and purposes French oysters. It is clear that the Legislature contemplated oysters being brought over alive to this country, and there is nothing to prevent a person receiving them and selling them at once. If they may be brought alive into this country, there is no reason why they should not be stored in a tank or other confined building until they are wanted for use. Under such circumstances it could not be contended that they were taken from an English fishery. In the case before us the oysters were brought from France and placed in Stangate Creek, where there were no other oysters, and the place where they were put was marked off from the rest of the ground; there they remained and did not breed, and, although Stangate Creek covers a considerable number of acres of ground, I see no reason why oysters should not be stored there as they would be in a smaller space. It seems to me to be rather a question of fact as to whether they are placed there merely for the purpose of storage. They never assumed any other character than that of French oysters, and therefore I cannot see how any penalty attaches. I agree that, if they were brought over when they were very small, and were then placed on a bed and nurtured, with English oysters there, that would be making them English oysters, and would be within the mischief that the Act intended to deal with. But if (and I have no reason to suppose the contrary) it is only intended to use them in the way described in the case I cannot bring myself to think that the Legislature contemplated dealing with such a case. I therefore agree with Pollock, B. that this conviction must be quashed.

Conviction quashed.

Solicitors for the appellants, *Howell and Burt.*

Solicitor for the respondent, *C. O. Humphreys.*

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QUEEN'S BENCH DIVISION.

Wednesday, Nov. 2, 1892.

(Before POLLOCK, B. and HAWKINS, J.)

THE APOTHECARIES COMPANY v. JONES. (a)

Apothecary—"Acting or practising" without certificate—Penalty—Offence—Several acts on same day only one offence—Apothecaries Act (55 Geo. 3, c. 194), s. 20.

By the 20th section of the Apothecaries Act (55 Geo. 3, c. 194), if any person shall act or practise as an apothecary without having obtained a certificate, every person so offending shall for every such offence forfeit and pay the sum of twenty pounds. Three separate actions were brought against the defendant to recover three separate penalties for having treated and prescribed for three distinct patients on three separate occasions on the same day without having a certificate, contrary to the above section :—

Held, that the three acts of practising constituted only one offence of "acting or practising" within the meaning of the section, for which only one penalty could be recovered.

THIS was an appeal by the Apothecaries Company, from the judge of the County Court of Derby, who held that three separate acts of prescribing as an apothecary on the same day constituted only one offence within the meaning of the 20th section of the Apothecaries Act (55 Geo. 3, c. 194). The facts and arguments appear sufficiently from the judgments.

Boydell Houghton, for the appellants referred to *The Apothecaries Company v. Bentley* (1 C. & P. 538); *Milnes v. Bale* (33 L. T. Rep. N. S. 174; L. Rep. 10 C. P. 391); *Brooke v. Milliken* (3 Durnford & East, 509); *The Apothecaries Company v. Burt* (15 L. T. Rep. O. S. 257; 5 Exch. 363); *Reg. v. Hartley* (31 L. J. 232, M. C.); *Apothecaries Company v. Nottingham* (34 L. T. Rep. N. S. 76); *Apothecaries Company v. Warburton* (3 B. & Ald. 45).

The respondent did not appear.

Nov. 11.—The following written judgments were delivered :—

POLLOCK, B.—This is an appeal from a decision of the judge of the Derby County Court, in an action by the Apothecaries Company, against the defendant to recover penalties for his practising as an apothecary without a certificate. By the Apothecaries Act

(a) Reported by G. H. GRANT, Esq., Barrister-at-Law.

(55 Geo. 3, c. 194), provisions are made for the education, examination, and admission of apothecaries; and by sect. 20 it is enacted that, "if any person shall act or practise as an apothecary in any part of England or Wales without having obtained such certificate as aforesaid, every person so offending shall for every such offence forfeit and pay the sum of twenty pounds."

The plaintiffs sued the defendant in three actions to recover three penalties for three alleged offences, in attending, advising, and prescribing, and supplying medicines to three different patients, on three separate occasions on the same day. In the first case one Newman, having complained to the defendant of a pretended pain in his throat, the defendant examined him, and gave him some medicine and pills. Similar evidence was given in two other cases. The judge held that these acts and attendances constituted but one offence under the statute, and imposed only one penalty. In the other two cases he gave judgment for the defendant, upon the ground that only one offence had been committed. The judge, after finding against the defendant upon the facts, dealt very fully with the law of the case. With respect to the point raised before us, he said: "The question I have to determine is whether under these words the advising and prescribing for these three persons consecutively under the circumstances stated constitutes three offences or one offence? The words of the Act appear to me to point rather to an habitual, or, at all events, a continued course of conduct, than to an isolated act as constituting the offence. I have pointed out in my observations in the first case that in my opinion there was evidence that the treatment of Newman was a part and a particular instance of an habitual or at all events a continued course of conduct on the part of the defendant, and consequently that an offence within the meaning of the Act was proved." The judge then alludes to the cases decided under the Apothecaries Act, which were cited before him and also before us, and which, as far as they go, are mainly in favour of the view taken by him. I should have been content, under these circumstances, to say no more than that I agree with what is said by the judge below, but that during the argument, counsel for the appellant called our attention to the fact that in none of these decisions was the matter fully argued, and that they were founded, no doubt, in great measure upon the well-known judgment in the case of *Crepps v. Durden* (Cowp. 640), where it was held that a baker who sold a number of hot loaves on the same Sunday could not be convicted of more than one offence. The prescribing for and administering medicine to different patients, he argued, could not properly be compared to the selling of different rolls, especially as in the former case an offence against each separate patient would seem to be involved. There is, no doubt, great force in this remark, and it might afford a good ground for amending the provisions of the Apothecaries Act; but as that Act now stands, its provision as to the offence created by it is

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identical with that of the Sunday Trading Act. The language of the 29 Car. 2, c. 7, is: "Whosoever shall do or exercise any worldly labour, business, or work of their ordinary calling on the Lord's Day," &c. That of the Apothecaries Act is: "If any person shall act or practise as an apothecary," &c. And both Acts go on to provide that every person so offending "shall for every such offence forfeit," &c. It appears to me, therefore, to be clear that, however the subject-matter and character of the offences created by the two statutes may differ, they are both directed against an habitual or continuous course of conduct, and not against an individual act, and therefore they ought both to receive the same construction. The appeal, therefore, ought, in my judgment, to be dismissed, and with costs.

HAWKINS, J.—I am also of opinion that the County Court judge was right in the view he took in holding that the advising and prescribing proved against the respondent constituted in law but one offence, for which one penalty only was recoverable, and that consequently the respondent is entitled to our judgment. Three separate actions were brought by the appellants against the respondent to recover under the 20th section of the Apothecaries Act (55 Geo. 3, c. 194), three separate penalties of 20*l.* by reason as now alleged that thrice in one day, namely, the 6th day of May, 1892, he had acted and practised as an apothecary by giving advice and medicine to three persons named Newton, Eaton, and Page, without having obtained a proper certificate entitling him so to do. In the first of these cases the learned judge gave judgment for the plaintiff for the penalty of 20*l.* In the other cases he gave judgment for the defendant, upon the ground that, although either case might have been relied upon to support an action, and all three cases might in either case have been proved as evidence of the defendant's infringement of the 20th section, still the three cases together formed but one offence in law within the true meaning of that section. The material words of the section are as follows: "If any person shall act or practise as an apothecary without having obtained such certificate, every person so offending shall for every such offence forfeit 20*l.*" It may be convenient here to add that the same section imposes upon any unqualified person who shall act as assistant to an apothecary to compound and dispense medicines, for every offence a penalty of 5*l.* Were there no authorities to assist one in forming a judgment upon the case, I can hardly suppose that, had the penalty been imposed merely for practising as an apothecary, it would have been seriously contended that a person could have been convicted of more than one offence, even though in the course of the same day a hundred patients had been prescribed for. It could never have been in the contemplation of the Legislature that each day during which a person illegally practised should be divided into hours or minutes during each of which the heavy penalty of 20*l.* would be incurred. Nor could it have been the intention of the Legislature that each individual

act of prescribing should be deemed such separate offence. To practise a calling does not mean to exercise it upon an isolated occasion, but to exercise it frequently, customarily, or habitually. See *Clark v. The Queen* (52 L. T. Rep. N. S. 136 ; 14 Q. B. Div. 92), in which it was held that to render a person liable to be convicted of frequenting a public place with intent to commit a felony it was not sufficient to prove that on one occasion only the prisoner was in the place with intent, but it ought to be shown that he was there habitually. And though it is true each individual act would afford cumulative evidence of practising, yet bare proof of one individual act would not of itself amount to a "practising." The words of the section, however, are "act or practise;" it becomes therefore necessary to ascertain the meaning of the word "act" as there used. During the argument I was disposed to think the words "act or practise" were used synonymously, and I am not sure that this is not the correct view. Be that as it may, another interpretation may be given to the word equally favourable to the defendant. It may be the word "act" was used in addition to "practise" to meet the case of persons who without practising habitually as apothecaries might nevertheless occasionally act as such. But here again the Legislature could never have intended, and the language of the section does not force one to such a construction, that whilst a person habitually practising without a certificate could only incur one penalty each day he so practised a person who did not habitually practise, and therefore was not so grave an offender, should nevertheless be liable to a separate penalty for every act of prescribing without limit as to number. In other words that twenty acts of practice in one day would in the case of persons habitually practising only constitute one offence, whereas against a much less persistent offender each act might be treated as a separate offence, and visited with a separate penalty. Applying the same considerations to the case of an assistant it seems impossible to suppose that every act of assistance, for instance, the making up of every pill or mixture could be visited with a separate penalty of 5*l*. Good sense revolts at the idea of such a construction of the section. Very few cases are to be found in the books directly touching the point under discussion, and in neither of them is the point actually decided. In the *Apothecaries Company v. Bentley* (1 C. & P. 538) Lord Tenterden expressed his doubts, "whether a fresh penalty attached for every acting as an apothecary towards each different patient, and whether more than one penalty attached for a continual practising as an apothecary though the party attended different persons as patients." In the *Apothecaries Company v. Burt* (15 L. T. O. S. 257 ; 5 Ex. 363), the question was again mooted, but it was not thought necessary for the Court to express any opinion upon it. I must, however, observe as a significant fact that in no reported case since these doubts were expressed has more than one penalty been recovered, probably for the reason that it has been felt that

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Lord Tenterden's doubts were well founded. The case of *Crepps v. Durden and others* (1 Sm. L. Cas. 692) is a valuable authority for the respondent. It is true that case was determined upon the construction of another statute, but the grounds of the decision are applicable to the case before us. In *Crepps v. Durden* the plaintiff had been convicted in four separate convictions for unlawfully exercising his ordinary calling of a baker by selling rolls on Sunday, the 10th day of November, 1776, contrary to the statute 29 Car. 2, c. 7, the words of that statute being, "That no tradesman or other person shall do or exercise any worldly labour, business, or work of their ordinary calling, on the Lord's Day." It was assumed that there were several sales by the plaintiff of rolls on the Sunday mentioned in the convictions, but it was urged that the nature of the offence was such that it could only be committed once on the same day, and that if the plaintiff had continued baking from morning till night it would still be but one offence. The Court held that this was so, and in giving judgment, Lord Mansfield stated as the ground for it that "the offence is exercising his ordinary trade on the Lord's Day—and that without any fractions of a day, hours, or minutes. It is but one entire offence whether longer or shorter in point of duration; so whether it consist of one or a number of particular acts the penalty incurred by this offence is five shillings. There is no idea conveyed by the Act itself that if a tailor sews on the Lord's Day, every stitch he takes is a separate offence, or if a shoemaker or a carpenter work for different customers at different times on the same Sunday, that there are so many separate and distinct offences. There can be but one entire offence on one and the same day." Suppose for a moment the 20th section had stated in so many words that which is clearly the meaning of it, "if any person shall on any day of the week act, or practice, &c.," it would have required some ingenuity to distinguish the present case from *Crepps v. Durden*. The same reasons which guided the court in *Crepps v. Durden*, viz., that the offence created by the statute can alone be made the subject of conviction, the overt acts done in the commission of that offence are but so many pieces of evidence—had already been acted upon in the cases of *Marriott v. Shaw* (Com. 274) and *Reg. v. Mathews* (10 Mod. 26), in proceedings to recover penalties under stat. 5 Anne, c. 14, s. 4, which forbade the keeping by unqualified persons of dogs and engines for the destruction of game. It was there sought to recover a separate penalty for each hare killed; but it was decided that, the offence being the keeping and using of the dogs for the forbidden purpose, only one offence could be committed on the same day, and that the number of hares killed was immaterial. It was said by the Court in that case, "If a man not qualified go a hunting and kill ever so many hares upon the same day he would forfeit but one five pounds, for it is but one offence." This may be further illustrated by taking the case of two men charged each with

using a gun to kill game without a licence. If they shot through a whole day from morning till night each would be guilty of one offence only, and each separate use of the gun by firing a shot would not constitute a separate offence. If it were otherwise, a man who fired twenty shots would incur penalties amounting to 100*l.*, whilst one who for want of opportunity only fired one shot would only subject himself to a fine of 5*l.* None of the cases cited need comment beyond that which I have already made. I do not wish it to be understood that in cases arising under the Act now under consideration, the fact that an uncertificated person on two separate days prescribed and made up medicine for different persons would necessarily justify a conviction for a separate offence on each day; for it is not difficult to imagine cases in which acts of prescribing and making up medicine on several closely following days might taken together afford abundant evidence of practising. No such conclusion could fairly be drawn if the acts of each day had stood alone. Again, even though a patient be attended by a person clearly practising as an apothecary, it does not follow that because the attendance, prescription for and supply of medicine to such patient had extended over two days, or part of two days, two offences must necessarily have been committed. Take the case of a patient to whom in a case of urgency an unqualified person had attended continuously, say from 10 p.m. one day to 10 a.m. on the following, under such circumstances I should think one offence only would be committed, for all would be one continuous action. This view might be further illustrated by supposing a case of night poaching where the offender commenced his offence at 11 p.m. and continued it till 2 or 3 a.m. the next day. It is idle to attempt to lay down a golden rule upon the subject. Each case must depend upon the particular circumstances attending it. In the present case I have already said I think one offence only was committed, and I agree in the very sensible and sound judgment of the County Court judge. The result is, that I think this appeal should be dismissed with costs.

Solicitors for the appellants, *Upton, Atkey, and Upton*, for *Johnson and Co.*, Birmingham.

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QUEEN'S BENCH DIVISION.

Monday, Oct. 31, 1892.

(Before MATHEW and BRUCE, JJ.)

PUDNEY (app.) v. ECCLES (resp.). (a)

Game—Sale of game killed abroad—Necessity for excise licence—Game Act, 1831 (1 & 2 Will. 4, c. 32), ss. 2, 4, 18, 23—The Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 14.

It is not necessary for the seller of game, killed abroad, and imported into this country for sale, to take out an excise licence, though the game be of the same species as, and undistinguishable from, that used in this country.

The Game Act, 1831 (1 & 2 Will. 4, c. 32) and the Game Licences Act, 1860 (23 & 24 Vict. c. 90) apply only, and were intended to apply only, to English game.

Guyer v. The Queen on the prosecution of the Field Sports Protection Society (16 Oox C. C. 657; 60 L. T. Rep. N. S. 824; 24 Q. B. Div. 100; 58 L. J. 81, M. C.) approved.

THIS was a special case stated by Mr. Fenwick, one of the metropolitan police magistrates, sitting at the Southwark Police-court, which raised the question whether it is necessary for a seller of game killed abroad, and imported into this country for sale, to be provided with an excise licence.

The case was stated as follows:—

1. The respondent, Richard Eccles, was summoned to appear before me on the 19th day of June, 1892, to answer an information exhibited by order of the Commissioners of Inland Revenue, by the appellant, Henry Pudney, an officer of Inland Revenue, which charged the appellant with dealing in game without having in force such a licence as by the statute in that behalf was and is required, contrary to the statute in that case made and provided.

2. After hearing the case I dismissed the information, and, the appellant being dissatisfied with my judgment as being erroneous in point of law, I now state this case for the opinion of the Court of Queen's Bench.

3. Under the provisions of 23 & 24 Vict. c. 90, s. 14 (1860) every person dealing in game in England, Scotland, or Ireland, is required to obtain an excise licence upon payment of the duty of 2*l.*, and any person who purchases, or sells, or otherwise deals

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

in game before he obtains such a licence is to forfeit the sum of 20*l*. By 24 & 25 Vict. c. 91 (1861), s. 17, it is enacted that

The said penalty shall be incurred by every person who, under the provisions of the said Acts so referred to as aforesaid, ought to obtain a licence from the justices of the peace to deal in game, and who shall purchase or sell or otherwise deal in game before he shall obtain a proper excise licence under the provisions of the said first-mentioned Act, "to wit, 23 & 24 Vict. c. 90."

4. By sect. 13 of 23 & 24 Vict. c. 90, all the clauses, provisions, and penalties of 1 & 2 Will. 4, c. 32, and of the Act 2 & 3 Vict. c. 35 (which Acts were applicable to England only), relating to dealers in game, and to the selling of game so far as the same are consistent with the express provisions of the first mentioned Act, and as the same are altered or amended by that Act, are to extend to and be of full force and effect in and throughout the United Kingdom, and are to be observed, applied, and enforced as if the same, so altered and amended, and made consistent with the express provisions of that Act, had been therein repeated and specially enacted.

5. Sect. 2 of 1 & 2 Will. 4, c. 32, enacts that the word "game" shall for all the purposes of that Act be deemed to include "hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards."

6. At the hearing of the said information it was proved to my satisfaction, and I found as a fact that:

1st. On the 24th day of March, 1892, the respondent Eccles exposed for sale in his shop at 325, Old Kent-road, a hare and a brace of blackgame, which he on the same day sold to the appellant.

2nd. The respondent at the time of such sale did not hold an excise licence to deal in game, and

3rd. The said hare and blackgame had been killed abroad (to wit in Russia) and imported into this country for sale.

7. Evidence was given as to the possibility of distinguishing between hares and blackgame of the United Kingdom and foreign hares and blackgame. I found as a fact that the brace of blackgame were of the same species as and undistinguishable from the blackgame found in the United Kingdom and named in sect. 2 of 1 & 2 Will. 4, c. 32, and that the hare was of the same species as and undistinguishable from the hares found in Scotland (commonly called "blue hares") and named in sect. 2 of 1 & 2 Will. 4, c. 32.

8. It was contended on behalf of the respondent that, the hares and blackgame having been killed in Russia and imported into this country for sale, it was not necessary to have an excise licence, and in support of this contention the case of *Guy* v. *The Queen* (16 Cox C. C. 657; 60 L. T. Rep. N. S. 824; 23 Q. B. Div. 100; 58 L. J. 81, M. C.) was cited.

9. For the appellant it was contended that an excise licence was necessary, and that the provisions of the law with regard to excise licences for dealing in game were distinct from those which

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ECCLES,

1892.

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killed abroad
—Excise
licence—

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c. 32, ss. 2, 4,
18, 23;
23 & 24 Vict.
c. 90, s. 14.

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ECOLESS.

1832.

Game—Sale
of game
killed abroad

—Excise
licence—
1 & 2 Will. 4,
c. 32, ss. 2, 4,
18, 23;
23 & 24 Vict.
c. 90, s. 14.

had for their object the preservation of game in this country, and the case of *Harnett v. Miles* (48 J. P. 455) was cited in support of that contention.

10. I was of opinion that on the facts proved as aforesaid no excise licence was required by the respondent, and I therefore dismissed the information.

The question for the opinion of the court is, whether, under the above circumstances, the respondent was guilty of the offence charged against him.

By 1 & 2 Will. 4, c. 32, s. 18, the justices are required to hold a special session yearly for granting licences to persons to deal in game "empowering the person to whom such licence shall be granted to buy game at any place from any person who may lawfully sell game by virtue of this Act," that is, from any person who shall have obtained an annual game certificate (sect. 17), "and also to sell the same at one house, shop, or stall only kept by him." The form of the licence is given in schedule A of the Act, and is as follows :

At a special session of the justices of the peace of the county of _____ (or Riding, &c., as the case may be) acting for the division of _____ (or otherwise, as the case may be) in the said county holden at _____ in the said _____ on the _____ day of _____ in the year _____. We _____ being _____ justices acting for the said _____ assembled at the said special session do hereby authorise and empower A. B. of _____ (here insert the name, description, and place of residence, &c.) being a householder (or the keeper of a shop or stall as the case may be) to buy game from any person authorised to sell game by virtue of an Act passed in the second year of the reign of King William IV., entitled, "An Act to amend the laws in England relative to game;" and we do also authorise and empower the said A. B. to sell at his house (shop or stall) any game so bought, provided that the said A. B. shall affix to some part of the outside of the front of his house (shop or stall), and shall there keep a board having thereon, in clear and legible characters, his Christian name and surname, together with the following words, "Licensed to deal in game."

Then by sect. 14 of 23 & 24 Vict. c. 90, it is provided that

Every person who shall have obtained any licence to deal in game from the justices of the peace under the provisions of the said two several Acts in the preceding clause mentioned (1 & 2 Will. 4, c. 32, and 2 & 3 Vict. c. 35), shall annually and during the continuance of such licence, and before he shall be empowered to deal in game under such licence, obtain a further licence to deal in game under the Act on payment of the duty hereby charged thereon, and if any person obtaining a licence from the said justices as aforesaid shall purchase, or sell, or otherwise deal in game before he shall obtain a licence to deal in game under the provisions of this Act, he shall forfeit the sum of twenty pounds.

By sect. 15 of the said Act (23 & 24 Vict. c. 90) :

No licence to deal in game shall be granted under the provisions of this Act to any person, except upon the production of a licence for the like purpose duly granted to him by the justices of the peace as aforesaid and then in force.

Danckwerts for the appellant revenue officer.—The game-dealer's licence is required during any part of the year. It was always required for selling hares even before a close season was instituted, and it has nothing to do with the preservation of game or with the close season. To allow a man to sell foreign game without an excise licence would make a distinction in favour of foreign game which the Legislature has not, and could

not have contemplated. The learned magistrate has misconstrued the case of *Guyer v. The Queen* (60 L. T. Rep. N. S. 824; 23 Q. B. Div. 100). That case was decided on sect. 4 of the statute (1 & 2 Will. 4, c. 82), solely on the ground that the object of that section was the preservation of game. Later sections of the same Act, however, have a different object, namely that of raising a revenue, as was decided with regard to sect. 23 in the case of *Saunders v. Baldy* (13 L. T. Rep. N. S. 322; 35 L. J. 71, M.C.). Sect. 14 of 23 & 24 Vict. c. 90, is a revenue section, and the excise licence is required in order to sell game of any description. The form of the licence given in schedule A. to 1 & 2 Will. 4, c. 32 is abolished by 23 & 24 Vict. c. 90, and the present form is merely a licence to deal in game generally.

Sutton, for the magistrate, was not called upon to argue.

No one appeared on the part of the respondent.

MATHEW, J.—I am of opinion that the magistrate's decision was right. The question is whether an excise licence, which the person did not possess, is necessary to enable him to sell birds which have not been killed in the United Kingdom. The argument with which Mr. Dankwerts strenuously, but ineffectually, dealt, is that the whole scheme of the legislation contemplated by the Act of Will. 4, was to deal only with English game, and that the later Acts must be viewed by the light of the earlier. Now if we turn to the form of the licence given in schedule A. appended to the Act of Will. 4, the construction of the section becomes perfectly plain. The licence authorises the licensee to buy game from any person authorised to sell game by virtue of the Act (that is any person who has taken out an annual game certificate), and to sell any game so bought. The form clearly shows that the licence applies only, and was intended to apply only, to English game. The subsequent statutes extended the provisions of 1 & 2 Will. 4, c. 32, but we can give no effect to these revenue sections outside the scope of the Act by which it could not be intended to raise a revenue except in respect of the certificates and licences contemplated by it. Then it is said that the statute of 1860 (23 & 24 Vict. c. 90) shows an intention to raise a revenue from the sale of game of any description, but on turning to the Act itself, it is clear that it refers to the earlier Acts which are, as it were, incorporated with it. Sect. 17 of 23 & 24 Vict. c. 90, says as follows: [His Lordship read the section.] The reasoning of Hawkins, J. in the case on which the magistrates acted is to my mind quite correct, and the consequence of acting otherwise would be absurd. I cannot suppose for a moment that the Legislature intended any such preposterous construction as that for which the appellant has contended here.

BRUCE, J.—I am of the same opinion. The whole series of statutes must be read together, the later in the light of the earlier. I think that the reasoning of Hawkins, J. in the case to which

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reference has been made is right, and that the decision of the magistrate in this case must therefore be affirmed.

Appeal dismissed.

1892.

Solicitor for the appellant, *Solicitor of Inland Revenue*,
Solicitor for the magistrate, *Solicitor to the Treasury*.
The respondent was not represented.

Game—Sale
of game
killed abroad
—Excise
licences—

1 & 2 Will. 4;
c. 32, ss. 2, 4,
18, 23;
23 & 24 Vict.
c. 90, s. 14.

EPIPHANY QUARTER SESSIONS.

BEDFORDSHIRE.

Wednesday, Jan. 4, 1893.

REG. v. JOHN BUTTERFIELD, SEN. AND JOHN BUTTERFIELD, JUN. (a)

Poundbreach—Indictable offence—Cattle seized under warrant of distress for rent and placed in inclosed field—Removal of cattle from field.

It is an indictable offence to rescue cattle seized under a distress warrant for rent and impounded in an inclosed field.

THE defendants were indicted for having on the 13th day of November, 1892, at Radnell, in the parish of Felmersham, in the county of Bedford, broken a certain pound and rescued therefrom five heifers and three cows which had been distrained upon for rent and duly impounded.

It was proved that the defendant John Butterfield the younger was the occupier of agricultural land at Radnell, the landlady being Mrs. Mary Ann Stafford, the prosecutrix.

On the 12th day of November, 1892, 57*l.* was owing to the prosecutrix from that defendant for rent which had accrued due. On that day she signed a warrant of distress authorising one Frederick Winser, a bailiff duly certified under the Law of Distress Amendment Act, 1888, to levy a distress for the rent on the demised premises. On the same day Winser went to the premises and saw the elder defendant, but not his son the tenant. Winser told the elder defendant he had come for the rent, and asked to see his son. The father replied that he himself had nothing to do with the rent, which was his son's affair, and that he was not there. Winser then went round the land with Edward Stafford, the prosecutrix's husband, and took an inventory in his book, which was produced. The inventory included

(a) Reported by CHARLES L. ATTENBOROUGH, Esq., Barrister-at-Law.

the cattle mentioned in the indictment which were at the time in a field called the Home Close. Winsor then returned to the house and told the elder defendant that he had seized the cows, horses, and all that there was on the farm. He offered to read his inventory to him, but the defendant said he did not wish to hear it. Winsor then left the premises to fetch a man to remain in possession, leaving Stafford on the premises with the warrant. Winsor returned later in the day with one Frederick Boase. He took Boase round the farm and checked the inventory with him, and then he and Stafford went away leaving Boase in possession, and delivering to him the distress warrant.

Between 5 and 6 p.m. Boase fastened the latch of the gate where the cattle were, but it did not appear that they were secured in any other way. He then left to get some refreshment, and returning to the field between 8 and 9 p.m. he found the cattle were still there. He then went to his lodgings in the neighbouring village, and remained there all night.

On the following morning between 7 and 8 a.m. Boase went to the field and found that the cattle were not there, nor were they on any other part of the farm.

Between 5 and 6 a.m. of that morning both the defendants were met by a police constable on the road to Wilden and about five miles from the demised premises. They were driving the cattle in question towards Wilden, and in answer to a question by the constable the younger defendant said they came from Thurlough, which was untrue. The defendants took the cattle to the premises of a farmer named Mitchell at Wilden, and with his permission left them there all that day and the greater part of the night. They sold two of the cattle to Mitchell and went away with the other six early the next morning. These six cows had not since been heard of. The other goods distrained upon were not nearly sufficient to cover the rent which was due.

W. H. B. Lindsell for the defendants.—Firstly, poundbreach is not now an indictable offence even if it were so in former times. It is not mentioned in Archbold's Criminal Pleading and Evidence. In Russell on Crimes, 5th edit., vol. 1, p. 560, it is only said that "the forcibly rescuing goods distrained and the rescuing cattle by the breach of the pound in which they have been placed have been considered as offences at common law and made the subject of indictment." No case can be cited of a prosecution for poundbreach following a distress for rent. A remedy for summary conviction is provided by 6 & 7 Vict. c. 30, in the case of a rescue of cattle distrained for trespass damage feasant. The treble damages and costs which the landlord may recover by action under 2 Will. & M. c. 5, s. 4, if goods distrained for rent are rescued is a sufficient protection and no indictment will now lie in such a case. Formerly all pounds were public, and it might perhaps have been then said that poundbreach was an offence against public justice and indictable as such. But since 11 Geo. 2, c. 19, which authorised an

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—Sufficiency
of impound-
ing.

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offence—
Cattle in
inclosed field
—Sufficiency
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ing.

impounding on the demised premises, it cannot be said that to remove goods from such a private pound is an offence against the public. This distinction between a public and a private pound is pointed out by Hawkins, J. in *Green v. Duckett* (48 L. T. Rep. N. S. 677; L. Rep. 11 Q. B. Div. 275; 52 L. J. 435, Q. B.). Secondly, the distress was not impounded; all that was done was to make an inventory. No notice of distress was given to the tenant, nor was any copy of the inventory left on the premises. The cattle were not "impounded or otherwise secured" within the meaning of 11 Geo. 2, c. 19, s. 10. They were allowed to remain in the field where they were, and the gate was not locked or secured otherwise than by the latch. To constitute an impounding there must either be a separation and securing of the goods distrained or notice of distress given to the tenant. He referred to *Swann v. Earl of Falmouth* (8 B. & C. 456.)

W. A. Attenborough for the prosecution.—An indictment lies for poundbreach and rescue. This appears by the passage in Russell on Crimes already referred to. Precedents of such indictments are found in 2 Chit. Crim. Law, 201; 4 Went. 314; and in the last edition of Saunders Precedents of Indictments. Treble damages was no remedy when, as in the present case, the defendants were impecunious. Goods distrained upon are in the custody of the law, and it is an injury to public justice to remove them out of such custody with a view to defraud the landlord of the fruits of his distress. In *Green v. Duckett* the distress was not for rent but for damage feasant. A sufficient tender had been made and the facts differed from those of the present case in other respects. Secondly, as to the impounding.—The bailiff and the man in possession did all they reasonably could to secure the distress, and Boase could not be expected to remain all night in the open field. The cattle were confined to one field and the gate was closed. An open field is a sufficient pound for cattle: (*Castleman v. Hicks*, 1 C. & M. 266; Woodf., 13th edit., 476). Notice of distress is only required to enable the landlord to sell, the distress and impounding being perfectly good without such a notice, though doubtless the jury will not convict on this indictment unless they are satisfied that both defendants knew of the distress. Verbal notice was given to the elder defendant.

The Court (without giving reasons) held that an indictment lay for poundbreach under the circumstances alleged, and that there was evidence of an impounding to go to the jury.

The jury disagreed.

Solicitors for the prosecution, *Conquest and Clare*, Bedford.
Solicitors for the defendants, *Mitchell*, Bedford.

WORCESTERSHIRE AUTUMN ASSIZES.

Monday, Nov. 21, 1892.

(Before DAY, J.)

REG. v. ERNEST WILLIAM SMITH. (a)

Costs of prosecution—Subpœnaing infant witness.

Where the evidence of an infant witness is necessary to support a prosecution, such infant witness should be subpœnaed to appear and give evidence at the trial, and the costs of such subpœna should be allowed.

IN this case the prisoner was indicted for a rape alleged to have been committed upon a girl who was under twenty-one years of age.

Before the trial at assizes the girl, who was still an infant, was served with a subpœna to attend and give evidence at the assizes.

The girl attended and gave evidence at the assizes. The prisoner having been acquitted, after the verdict,

R. H. Amphlett, for the prosecution, applied that the expenses of subpœnaing the infant witness should be allowed to the prosecutor.

The officer of the court having opposed this application,

DAY, J. held that where a witness who is necessary for the prosecution is an infant, it is proper to subpœna him, for his recognizances cannot be estreated upon his breaking the condition entered into by him therein, that being a matter of contract entered into between him and the Crown; but if he disobeys a subpœna he may be attached for contempt. Accordingly the costs of such a subpœna should be allowed.

Order for payment.

(a) Reported by STAMFORD HUTTON, Esq., Barrister-at-Law.

CROWN CASES RESERVED.

Saturday, February 4, 1893.

(Before Lord COLERIDGE, C.J., HAWKINS, CAVE, DAY, and COLLINS, JJ.)

REG. v. INSTAN. (a)

*Manslaughter—Moral obligation and legal duty—Neglect of legal duty—Duty to assist sick and helpless person—Neglect to supply food and medicine.**The moral obligation to assist a sick and helpless person imposes a legal duty not to withhold such assistance, and consequently a person who wilfully neglects to enable a sick person to obtain such food and medicine as may be necessary to sustain life, is guilty of manslaughter.**A woman who lived alone with her sick and helpless aunt neglected to give to her aunt such assistance as was necessary in order to enable her to obtain food and medical attendance; and neglected also to inform persons able and willing to give assistance of her aunt's condition. It having been found as a fact that her negligence accelerated her aunt's death:—**Held, that she was properly convicted of manslaughter.***C**ASE stated for the opinion of the Court by Day, J.

The prisoner was indicted for feloniously killing Ann Hunt.

From the facts stated in the case, it appeared that the prisoner, who was unmarried and had no means of her own, lived with and was maintained by her aunt, the deceased Ann Hunt, a woman of seventy-three years of age, possessed of a small life income. Until a few weeks before her death the deceased was healthy and able to take care of herself. No one lived in the house with or attended to the deceased but the prisoner. Shortly before her death the deceased suffered from gangrene in the leg, which rendered her during the last ten days of her life quite unable to attend to herself or to move about, or to do anything to procure assistance.

No one but the prisoner had, previously to the death of the deceased, any knowledge of her condition. The prisoner continued to live in the house at the cost of the deceased, and took in the food supplied by the tradespeople. She did not give nor procure any medical or nursing attendance to or for the deceased, nor did she give notice to any neighbour of her condition or

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

wants, although she had abundant opportunity and occasion to do so.

The body of the deceased was, on the 2nd day of August, while the prisoner was still living in the house, found much decomposed, partially dressed in her day clothes, and lying partly on the ground and partly prone upon the bed. The cause of death was exhaustion caused by the gangrene, but substantially accelerated by neglect, want of food, of nursing, and of medical attendance during several days previously to the death. All these wants could and would have been supplied if any notice of the condition of the deceased had been given by the prisoner to any of the neighbours, of whom there were several living in adjoining houses, or to the relations of the deceased who lived within a few miles.

The learned judge left it to the jury to say, having regard to the circumstances under which the prisoner lived with the deceased and continued to occupy the house and to take the food provided at the expense of the deceased, while the deceased was, as she knew, unable to procure necessities for herself, whether the prisoner did or did not impliedly undertake with the deceased either to wait upon and attend to her herself or to communicate to persons outside the house the knowledge of her helpless condition, and directed the jury that if they came to the conclusion that the prisoner did so undertake, and that the death of the deceased was substantially accelerated by her failure to carry out such undertaking, they might find the prisoner guilty of manslaughter, but that otherwise they should acquit her.

The jury found the prisoner guilty.

Vachell, for the prisoner, submitted that the facts stated in the case showed that the deceased was the head of the household of which the prisoner was only a member. There was no duty on the part of the prisoner, either at common law or by contract to attend to the deceased, who was a person of full age and capable of taking care of herself. In *Reg. v Friend* (R. & R., p. 20) the deceased was an apprentice and of tender years, who had a right to his master's protection and assistance. The case of *Reg. v. Shepherd* (L. & C. 147) showed that unless there is a duty to provide a necessary of life for another arising either by statute or by contract or at common law, the neglect to provide such necessary does not amount to manslaughter. He also cited *Reg. v. Marriott* (8 C. & P. 425).

No counsel appeared for the Crown.

The judgment of the Court (Lord Coleridge, C.J., Hawkins, Cave, Day, and Collins, JJ.) was delivered by

LORD COLERIDGE, C.J.—It is not correct to say that every moral obligation is a legal duty, but every legal duty is founded upon a moral obligation. In this case, as in most cases, the legal duty can be nothing else than taking upon oneself the performance of the moral obligation. There is no question whatever that it was this woman's clear duty to impart to the

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*Manslaughter
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duty—Neglect
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and medicine
to sick and
helpless
person.*

deceased so much of that food which was taken into the house for both and paid for by the deceased as was necessary to sustain her life. The deceased could not get it for herself, she could only get it through the prisoner. It was the prisoner's clear duty at common law to supply it to the deceased and that duty she did not perform. Nor is there any question that the prisoner's failure to discharge her legal duty, if it did not directly cause, at any rate accelerated the death of the deceased. There is no case directly on the point, but it would be a slur and a stigma upon our law if there could be any doubt as to the law to be derived from the principle of decided cases, if cases were necessary. There was a clear moral obligation, and a legal duty founded upon it; a duty wilfully disregarded, and the death was at least accelerated, if not caused, by the non-performance of the legal duty. I am therefore of opinion—and I express the opinion of all my brethren—that the evidence confirmed all that it was necessary to show, and that the conviction was proper and must be upheld.

Conviction affirmed.

Solicitors for the prisoner, *Ivens and Norton*, Kidderminster.

QUEEN'S BENCH DIVISION.

Saturday, Jan. 14, 1893.

(Before Lord COLERIDGE, C.J. and CAVE, J.)

McKENZIE (app.) v. DAY (resp.). (a)

Licensing—"Illegally dealing in intoxicating liquor"—Buyer and seller of intoxicating liquor—Conviction of buyer—Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 17.

The respondent was found on unlicensed premises to be buying and consuming intoxicating liquor, and was summoned before the stipendiary magistrate of Cardiff for being found in a house in that town for the purpose of "illegally dealing in intoxicating liquor," contrary to the provisions of sect. 17 of the Licensing Act, 1874.

The magistrate refused to convict the respondent for being a buyer, holding that "dealing" could only be by the seller.

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

Held, that the words "illegally dealing" in intoxicating liquor must be read to include both buyer and seller, and therefore the magistrate must convict the respondent.

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*Licensing
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Illegal deal-
ing in
intoxicating
liquor—Con-
viction of
buyer—
37 & 38 Vict.
c. 49, s. 17.*

THIS was a case stated under 20 & 21 Vict. c. 43, and the Summary Jurisdiction Act, 1879, and the facts and the finding of the learned stipendiary magistrate are set out as follows:—

Case stated by me, Thomas William Lewis, Esq., Stipendiary Magistrate for the Borough of Cardiff, under the statute 20 & 21 Vict. c. 43, and the Summary Jurisdiction Act, 1879, for the purpose of obtaining the opinion of the court on the questions of law hereinafter stated, the appellant having duly applied to me in writing to state this case, and entered into a recognisance as required by the said statute, and the Rules of Court made thereunder.

1. The respondent appeared before me on the 26th day of October, 1892, in answer to a summons issued on the information of the appellant, who is the head constable for the borough of Cardiff, charging her with having, on Sunday, the 11th day of October inst., been found at No. 19, Mary Ann-street, Cardiff, for the purpose of illegally dealing by buying beer at such time as a constable entered the same under a warrant issued under sect. 17 of the Licensing Act, 1874, and at which he had seized and wherefrom he had removed beer which there was reasonable ground to suppose was on the premises for the purpose of unlawful sale.

2. The said 17th section of the Licensing Act, 1874, provides (*inter alia*):

That when a constable has entered any premises in pursuance of any such warrant as is mentioned in this section, and has seized and removed such liquor as aforesaid, any person found at the time on the premises shall, until the contrary is proved, be deemed to have been on such premises for the purpose of illegally dealing in intoxicating liquor, and be liable to a penalty not exceeding forty shillings.

A police constable stated that on Sunday, the 16th day of October inst., by virtue of a warrant he entered the house No. 19, Mary Ann-street, and found on the premises twelve jugs (seven being pint jugs), three glasses, and a four-and-a-half gallon cask tapped and containing some beer, all of which he seized and subsequently removed.

One Ellen Riley was in the same room with the respondent Day, and as the constable entered was in the act of handing a pint of beer to a man named Smith and receiving money therefor. When the constable was collecting the drinking vessels, the respondent Day said, "You shall not have this (referring to a pint jug she held in her hand); I have paid for this, and I will drink it."

The evidence being completed, it was contended on behalf of the appellant that a person found on unlicensed premises buying beer was illegally dealing in intoxicating liquor within the meaning of the Act, and in support of the proposition certain authori-

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ties were cited, and it was sought to show, from the meaning assigned to the word "deal" in various dictionaries, that it might be applied with propriety to an act of purchase.

I was of opinion that the ordinary meaning of the word "to deal," used intransitively, is "to trade," "to furnish as a retailer," "to transact business," "to traffic," "to act between two persons," "to practise," "to negotiate."

That a dealer is one who distributes: (see *Allen v. Sharpe*, 11 L. T. Rep. O. S. 155; 17 L. J. 209, Ex.; 2 Ex. 352.)

That the words "dealing in" being qualified by the word "illegally," and "buying" intoxicating liquor not having been heretofore constituted as an offence against the law, the words "illegally dealing in" do not apply to the act of buying intoxicating liquor unless the buyer also sells or exposes or keeps for sale such liquor.

That the penalty for selling intoxicating liquor without a licence under sect. 3 of the Licensing Act, 1872, is 50*l.*, and the penalty under sect. 17 in question is 40*s.*, the former is incurred only by a person proved to be guilty of selling, whereas the latter is incurred by a person presumed to be guilty of dealing in intoxicating liquor.

That the object of sect. 17 is to detect intoxicating liquor sold, or exposed or kept for sale on unlicensed premises, and to render more easy the conviction of persons offending by illegally selling the same.

That, if the Legislature had intended by sect. 17 to constitute as an offence the act of buying intoxicating liquors on unlicensed premises, such intention would have been expressed in clear, precise and unambiguous language, as in sect. 148 of the Spirits Act, 1880 (43 & 44 Vict. c. 24), where buying spirits from unlicensed persons is made an offence.

That, as a penalty is imposed by the section, the words thereof must be strictly construed.

That, as the evidence of the constable proved that at the time and place above mentioned the intoxicating liquor sold was sold by Ellen Riley on premises occupied by her, and that the respondent, Eliza Day, was neither selling nor keeping for sale intoxicating liquor, but was only a buyer and consumer of the liquor, the contrary of the presumption arising from her presence at the said time and place was proved, and therefore she was not to be deemed to be on the premises for the purpose of illegally dealing in intoxicating liquor.

I therefore dismissed the summons.

The question of law for the opinion of the court is, whether the said summons was rightly dismissed on the ground that the presumption of illegal dealing in intoxicating liquor raised against a person found on unlicensed premises within the meaning of sect. 17 of the Licensing Act, 1874, is rebutted by proof of the following facts, namely:—

1. That such person did not sell, or expose or keep for sale, intoxicating liquor.

2. That such person bought and consumed intoxicating liquor. Licensing Act, 1874 (37 & 38 Vict. c. 49):

Sect. 17. Any justice of the peace if satisfied by information on oath that there is reasonable ground to believe that any intoxicating liquor is sold by retail or exposed or kept for sale by retail at any place within his jurisdiction, whether a building or not, in which such liquor is not authorised to be sold by retail, may in his discretion grant a warrant under his hand, by virtue whereof it shall be lawful for any constable named in such warrant, at any time or times within one month from the date thereof, to enter, and if need be by force, the place named in the warrant, and every part thereof, and examine the same and search for intoxicating liquor therein, and seize and remove any intoxicating liquor found therein which there is reasonable ground to suppose is in such place for the purpose of the unlawful sale at that or any other place, and the vessels containing such liquor; and in the event of the owner or occupier of such premises being convicted of selling by retail or exposing or keeping for sale by retail any liquor which he is not authorised to sell by retail, the intoxicating liquor so seized, and the vessels containing such liquor shall be forfeited.

When a constable has entered any premises in pursuance of any such warrant as is mentioned in this section, and has seized and removed such liquor as aforesaid, any person found at the time on the premises shall, until the contrary is proved, be deemed to have been on such premises for the purpose of illegally dealing in intoxicating liquor, and be liable to a penalty not exceeding forty shillings.

Any constable may demand the name and address of any person found on any premises on which he seizes or from which he removes any such liquor as aforesaid, and if he has reasonable ground to suppose that the name and address given is false may examine such person further as to the correctness of such name and address, and may, if such person fail upon such demand to give his name and address or to answer satisfactorily the questions put to him by the constable, apprehend him without warrant and carry him as soon as practicable before a justice of the peace.

Any person required by a constable under this section to give his name and address who fails to give the same, or gives a false name or address, or gives false information with respect to such name and address, shall be liable to a penalty not exceeding five pounds.

B. Francis Williams, Q.C. (C. J. Jackson with him) for the appellant.—The magistrate was wrong in not convicting the respondent. A person found on unlicensed premises to be buying beer is illegally dealing in intoxicating liquor within the meaning of sect. 17 of the Licensing Act, 1874. The word "dealer" applies just as much to a buyer as to a seller. Sect. 17 applies just as much to the seller as to the buyer. Before an article can be dealt in there must be two persons, a buyer and seller. By sect. 3 of the Licensing Act of 1872 the offence of selling intoxicating liquor without a licence is dealt with, and a penalty of 50*l.* affixed to the first offence, and by sect. 1 of the Act of 1874 the two Acts are to be construed together. Before an article can be dealt in there must be two persons, a buyer and seller. [They were stopped by the Court.]

Brynmor-Jones for the respondent.—The learned stipendiary magistrate was right in not convicting the respondent. To buy intoxicating liquor cannot be considered to constitute an offence against the law by the words "illegally dealing in intoxicating liquor." It was never the intention of the Legislature to create a new penal offence by the use of the words in a section which referred to search-warrants for liquor sold or kept upon premises contrary to law. As the words "illegally dealing" are not expressly defined in the statutes, it may be presumed that the Legislature uses the word "dealing" in the sense of trading or selling, distributing not receiving, just as it uses the word

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"dealer" in the sense of a "trader" or "seller." If the words "illegally dealing" refer to buying in the 17th section of the Act of 1874, they must refer in the same way to other sections in that Act, as well as to the Act of 1872. If the Legislature had intended by sect. 17 to constitute as an offence the act of buying intoxicating liquor on unlicensed premises, such intention would have been expressed in clear and unambiguous language, as in sect. 148 of the Spirits Act, 1880 (43 & 44 Vict. c. 24), which expressly enacts that, "If any person receives, buys, or procures any spirits from a person not having authority to sell or deliver the same, he shall, &c." That a dealer is a person who distributes, see Alderson, B. and Rolfe, B. in the case of *Allen v. Sharpe* (11 L. T. Rep. O. S. 155; 17 L. J. 212, Ex. : 2 Ex. 352.)

LORD COLERIDGE, C.J.—The learned stipendiary magistrate in this case refused to convict the respondent, who was summoned before him at the Cardiff Police-court for having been found in a house in that town for the purpose of "illegally dealing in intoxicating liquor" by buying beer, contrary to the provisions of sect. 17 of the Licensing Act, 1874, which section provides that, when a constable has entered any premises in pursuance of any warrant mentioned in the section, and has seized and removed the liquor which there was reasonable ground for supposing was on the premises for the purpose of unlawful sale, any person found at the time on the premises shall, until the contrary is proved, be deemed to have been on such premises for the purposes of "illegally dealing in" intoxicating liquor, and be liable to a penalty of forty shillings. The magistrate refused to convict on the ground that "dealing" referred to a seller and not to a buyer, and that a dealer implied the seller and not the buyer. I am of opinion, and hold, that "dealing" unquestionably extends to buying as well as selling, and it means a buyer as well as a seller. "To deal" means to deal with someone, and that someone else other than the seller is the buyer. The one object of the 17th section of the Licensing Act, 1874, was to prevent this illegal dealing going on in unlicensed premises, and the presumption is against all the persons in the house dealing in intoxicating liquor, unless they can show to the contrary that the persons there were not dealing in the liquor. The facts clearly show that the respondent was there for an illegal purpose. It is impossible to read these words "illegally dealing" otherwise than to include both the buyer and the seller, and therefore we remit this case to the magistrate, to convict the respondent.

CAVE, J.—I am of the same opinion.

Case remitted to the magistrate.

Solicitors for the appellant, *Andrew, Mellor, and Smith*, for *J. L. Wheatley*, town clerk, Cardiff.

Solicitors for the respondent, *Riddell, Vaizey, and Co.*, for *Joseph Henry Jones*, Cardiff.

BIRMINGHAM ASSIZES.

March 22, 1893.

(Before BOWEN, L.J.)

REG. v. RAM AND RAM. (a)

*Rape — Indictment of female — Practice — Joint indictment — Husband and wife — Felony — Separate trial.**A woman may be indicted for rape as a principal in the second degree.**There is no right to a separate trial in cases of a joint indictment.**It is solely a matter for the discretion of the Court.*

THE prisoners, Mr. and Mrs. Ram, were indicted jointly for rape upon Annie Edkins of the age of thirteen.

The girl was the domestic servant of the prisoners, and on Friday evening the 3rd day of December, 1892, she was sent out by them for a quantity of whisky.

All the parties partook of the whisky, and it appeared that the female prisoner forced the girl to drink.

The male prisoner then went upstairs to bed. Shortly after the female prisoner forcibly took the girl up to the man's bedroom, when he had connection with her.

Stubbins, for the prisoners, took objection before arraignment that a woman is incapable of rape. Therefore she cannot be indicted for rape jointly with her husband. Clearly she cannot be indicted separately.

Parfitt, for the prosecution.—This is an indictment for felony. Any two or more persons can be jointly indicted for felony, as principals in the first degree, or as accessories before the fact. The indictment is good in matter of law. That one of the principals is a woman is immaterial: (*R. v. Crisham*, C. & M. 187).

BOWEN, L.J. declined to quash the indictment for rape as against the female prisoner.

Stubbins then applied to have the two prisoners tried separately on the ground that admissions made by one prisoner, or questions and statements put to such prisoner were not evidence against the other prisoner, and would tend to unfairly prejudice the case as against the other prisoner. He mentioned *R. v. Blackburn* (6 Cox C. C. 333) which was against him, but cited the later authority of *R. v. Jackson* (7 Cox C. C. 357) which was decided by Bramwell, B., after consultation with Martin, B., as being in his favour.

(a) Reported by ARCHER M. WHITE, Esq., Barrister-at-Law.

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Parfitt contended that it was entirely in the discretion of the court, which discretion ought to be exercised solely with regard to the facts in each case. There was no necessity for a separate trial in this case. Especially as here the prisoners could give evidence on their own behalf, whereas, in the cases referred to by the defence, it was not competent for the prisoners, being charged with wilful murder, to give evidence if tried together.

BOWEN, L.J.—It is a matter for the discretion of the judge. Admissions by one prisoner or statements made to one are not evidence against the other, and should be separated in the direction of the court to the jury. The jury are to be presumed capable of treating the evidence separately. Both prisoners can give evidence under the Criminal Law Amendment Act, 1885, and this minimises the chance of any evidence against one only unduly prejudicing the other. I do not think there is any danger of injustice by permitting a joint trial in this case.

Verdict—Guilty.

Solicitors for the prosecution, Messrs. *Johnson and Co.*, Birmingham.

Solicitors for the prisoners, Messrs. *E. Bickley and Co.*, Birmingham.

Note.—It is clearly held by Lord Justice Bowen in the above case that a woman may be indicted for rape as a principal in the second degree. A man may be so indicted: (*R. v. Crisham*, C. & M. 187 (1841); *R. v. Gray and Wise*, 7 C. & P. 164 (1835).) As to a woman, the original authority for the proposition appears to be in 1 Hawkins' Pleas of the Crown, book 1, c. 16, sect. 10, and see 5 Burns' J. P. 66. But the cases cited by Hawkins do not bear out his statement. The nearest is *Lord Baltimore's case* (1768) (4 Burr. 2179). In that case, two women who were committed to take their trial as accessories before the fact to rape, were admitted to bail. There does not seem to be any unimpeachable authority in favour of the exact point raised in *Reg. v. Ram and Ram*. The ruling of Lord Justice Bowen is therefore a matter of importance, as affording a precedent for the future.

QUEEN'S BENCH DIVISION.

Tuesday, Feb. 7, 1893.

(Before LAWRENCE and COLLINS, JJ.)

CLEARY (app.) v. BOOTH (resp.). (a)

Assault—Corporal punishment of pupil by schoolmaster—Board school—Pupil's misconduct on the way to school and out of school hours—Extent of schoolmaster's authority under the Elementary Education Acts—Code of Regulations by the Education Department, 1892—33 & 34 Vict. c. 75, s. 97.

The appellant, the head master of a Board School, inflicted corporal punishment on a pupil belonging to the school, for an offence committed by the pupil when on the way to the school and out of school hours.

By a Code of Regulations issued by the Education Department, under the Elementary Education Act, 1870, a grant is given to the school, provided that the teachers and managers satisfy the inspector that all reasonable care is taken in the ordinary management of the school to bring up the children in habits of punctuality, of good manners and language, &c., and also to impress upon the children the importance of cheerful obedience to duty, of consideration and respect for others, &c.

The appellant having been summarily convicted of assaulting the pupil in respect of the punishment so inflicted, upon a case stated by the convicting magistrates :

Held, that, besides the reasonable authority of a parent or guardian which is delegated to the schoolmaster, the appellant had also the power to inflict corporal punishment upon a pupil for misconduct on the way to and from the school and out of school hours.

THIS was a case stated by the justices for the borough and county of Southampton, under the statutes 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, for the purpose of obtaining the opinion of the High Court on a question of law, arising out of the following facts :—

An information was preferred by Albert Booth, hereinafter called the respondent, against David Cleary, hereinafter called the appellant, charging the appellant that he did unlawfully assault and beat the said respondent. And upon hearing the said information and evidence, admissions and arguments on behalf of the appellant and respondent, the appellant was convicted of the said offence.

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

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The appellant being dissatisfied with the determination of the justices in point of law required them to state a case in writing for the opinion of the High Court, which was accordingly done.

The following was shortly the evidence taken before the magistrates on behalf of the respondent: That the respondent was with some other boys on his way to the Board School at which the appellant is the head master, when another boy was hit in the face by something the respondent or the other boys with him threw. Someone informed the appellant what had occurred, and the appellant inflicted corporal punishment upon the respondent when he reached the school.

No evidence was called by the appellant, but it was submitted on his behalf that he was entitled to punish a pupil under the circumstances stated, the act for which such punishment was inflicted having been done on the way to school, but outside and at a considerable distance from the school premises.

The justices were of opinion that the appellant was not entitled to punish a pupil for anything done by such pupil, although against another pupil, each being on their way to school, the act having been committed off the school premises and unconnected with the school.

The two questions left by the justices for the opinion of the High Court were as follows:

1. Whether the appellant was justified, under the circumstances, in inflicting such punishment, and was therefore not liable to be convicted of a common assault.

2. Whether, if the appellant was so justified, the punishment inflicted was not excessive.

The conditions required in order to obtain a Parliamentary grant are imposed as follows: The Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 97, enacts that:

The conditions required to be fulfilled by an elementary school in order to obtain an annual Parliamentary grant shall be those contained in the minutes of the Education Department, in force for the time being, &c.

It is provided as follows in the Code of Regulations (1892), article 101, sub-sect. (b) (1):

A grant of discipline and organisation of 1s. or 1s. 6d. The Department shall decide which, if either, of these sums shall be paid after considering the report and recommendation of the inspector. The inspector in recommending either the higher or the lower of the grants will have special regard to the moral training and conduct of the children, to the neatness and order of the school premises and furniture, and to the proper classification of the scholars, both for teaching and examination. But he will not interfere with any method of organisation adopted in a training college, if it is satisfactorily carried out in the school. To meet the requirements respecting discipline the managers and teachers will be expected to satisfy the inspector that all reasonable care is taken in the ordinary management of the school, to bring up the children in habits of punctuality, of good manners and language, of cleanliness and neatness, and also to impress upon the children the importance of cheerful obedience to duty, of consideration and respect for others, and of honour and truthfulness in word and act. The inspector should also satisfy himself that the teacher has not unduly pressed those who are dull or delicate in preparation for examination at any time of the year.

Poland, Q.C. (P. H. White and H. Lynn with him) for the appellant.—The appellant was quite justified in inflicting the corporal punishment which he did inflict, and he was not liable to conviction for a common assault. The authority of the schoolmaster is not limited by the four walls of the schoolhouse. The Code of Regulations, 1892, issued by the Education Department pursuant to sect. 97 of the Elementary Education Act, 1870, shows that a grant is given to the schools for the discipline and organisation found by the inspector to exist in the school, special regard being had to the moral training and conduct of the children attending the school, and therefore the duty of the master cannot entirely end in the school and at the end of the school hours: (*Fitzgerald v. Northcote*, 4 F. & F. 656.) On p. 663 the rule is stated by the reporter in a note on that page as follows: "There is a singular absence of authority on the subject of the power of a schoolmaster to retain the person of the scholar, and such authorities as there are to be found are for the most part ancient practice to be deduced by analogy. . . . The position of the schoolmaster seems to be that of a temporary guardian. Hawkins lays it down, 'There are some actual assaults on the person of another which do not (even) forfeit a recognisance of good behaviour, as where a parent reasonably chastises his son, or a schoolmaster his scholar . . . while the relation of master and scholar exists, therefore, it seems that either moderate chastisement, or reasonable restraint of the person either to prevent running away, or to punish breaches of discipline, may be justified.'" On p. 689, Cockburn, C.J., in summing up to the jury in that case, said: "I have to tell you that the authority of the schoolmaster is, while it exists, the same as that of the parent." Even when the parent's authority is delegated, the corporal punishment inflicted must be moderate and reasonable. See *Reg. v. Hopley* (2 F. & F. 202). I submit that the parent's delegated authority to the schoolmaster does not only apply to within the four walls of the schoolhouse. *Hunter v. Johnson* (51 L. T. Rep. N. S. 791; 53 L. J. 182, M. C.; 13 Q. B. Div. 225) also cited.

The respondent, was not represented.

LAWRANCE, J.—The question in this case is by no means an easy one, for there is no express authority on the point. The question is whether the head master of a board school is justified in inflicting corporal punishment on a pupil who has misconducted himself outside the school, on his way to school, and out of school hours? The cases cited show that a schoolmaster has delegated to him the authority of a parent, and when a pupil is in school the schoolmaster is in the position of a parent, but the question here is, whose duty is it, the parent's or the schoolmaster's, to take notice of acts of misconduct committed by a pupil on his way from school to his home or *vice versâ*. No doubt, to be effective the punishment inflicted should be quickly inflicted after the offence has been committed. The cases cited show what is to be

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done by the master with the pupils when they are in school and away from home, but there is nothing to show what is to be done when they are between their homes and their school and misconduct themselves. I am of opinion that in such cases the power of the father, as was exercised by the appellant in this case, is delegated to the schoolmaster. The regulations of the Education Department of 1892 contain a clause allowing a grant for discipline and organisation, and it is also provided in that clause that care should be taken in the management of a school to bring up the children in habits of punctuality, good manners and language, and also to impress upon the children the importance of obedience, respect for others, and of honour and truthfulness. It could not therefore be said, if the schoolmaster was only allowed to punish for acts done in the school, that he had done everything to ensure that end. Should a boy misbehave himself immediately after leaving the school premises, I am clearly of opinion that in such a case the schoolmaster would have authority to punish the boy so misconducting himself. It would not be reasonable, I think, to hold that the parent's authority ended at the door of his own house, and that the schoolmaster's authority did not begin until the schoolhouse was reached. I am of opinion that, in this case, the justices were wrong in coming to the decision they did, and the case must be sent back to them to find, as a fact, whether the punishment was excessive or not.

COLLINS, J.—I am of the same opinion. It is clear law that the father has the right to reasonably punish his children. From classic times we have the practice of inflicting corporal punishment by the parent. The question now before us is how far are we to infer that this right is delegated to the schoolmaster by the parent or guardian. Does the parent delegate his power beyond certain limits? The bringing up and discipline must, to some extent, extend to children when outside the school as well as when inside the school. The parent's authority could never be worked if it is to extend up to the school door, and the schoolmaster's authority were to end when the child leaves the school. Supposing a pupil were to hit the master outside the school, the only remedy the master would then have would be a prosecution for assault against the pupil. Can the moral training and conduct of children be said to only exist in school and during school hours? The Regulations issued by the Education Department say that all reasonable care is to be taken in the ordinary management of the school, to bring up the children in habits of punctuality, of good manners, &c., of consideration and respect for others, &c. Here it is said to be reported to the schoolmaster that a boy, instead of consideration and respect for another boy, had hit that other boy and injured him. I think that we are entirely justified in interpreting that the parent had delegated his authority, and that the corporal punishment inflicted by the schoolmaster was entirely within the master's delegated authority.

Whether the punishment so inflicted was more than was reasonable was a question for the magistrates.

Case remitted to the magistrates to determine whether the corporal punishment inflicted was excessive or not.

Solicitors for the appellant, *Baker and Nairne*.

The respondent was not represented.

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QUEEN'S BENCH DIVISION.

Saturday, Feb. 4, 1893.

(Before Lord COLERIDGE, C.J. and HAWKINS, CAVE, DAY, and COLLINS, JJ.)

PEUN v. ALEXANDER. (a)

Licensing Acts—Sale of liquor during prohibited hours—Bonâ fide traveller, who is—Licensing Act, 1874 (37 & 38 Vict. c. 49) ss. 9, 10.

The proper test of a person being a bonâ fide traveller within the meaning of sect. 10 of the Licensing Act, 1874 is whether the main object of his journey was either for business or pleasure, or whether it was undertaken with the purpose of obtaining drink.

The appellant, a licensed victualler at Little Houghton, a village three and a half miles from Northampton, was convicted by the magistrates of Northampton under sect. 9 of the Licensing Act, 1874, of selling intoxicating liquor during prohibited hours on Sunday to persons who were not bonâ fide travellers within sect. 10. The evidence showed that the back yard of the defendant's premises was fitted up with tables and benches, and that two extra waiters were employed to attend to the Sunday customers. There were 131 persons on the premises, most of whom were known to the defendant as artisans from Northampton. They were served only once with beer, and with no more than a pint each. After being served they departed in an orderly manner, and nearly all walked back to Northampton without going further. The defendant before serving them asked them where they came from and where they lodged the preceding night.

Held (Cave, J. dissenting), that there was sufficient evidence on

(a) Reported by G. H. GRANT, Esq., Barrister-at-Law.

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which the magistrates might find as they did that the main object of the purchasers in walking from Northampton to Little Houghton was to obtain drink, and that they were therefore not bonâ fide travellers within the meaning of sect. 10.

Held, also, that there was sufficient evidence to justify the magistrates in finding that the defendant did not truly believe them to be bonâ fide travellers.

CASE stated by justices of Northampton as follows :

In this case the appellant, who is a licensed victualler, and the occupier of the White Lion beerhouse, at Little Houghton, in the county of Northampton, was convicted by a court of summary jurisdiction under the Licensing Act, 1874, for opening his premises for the sale of intoxicating liquors during prohibited hours on Sunday, the 10th day of April last, when the appellant was fined 5*l.*, and his licence ordered to be indorsed.

The appellant duly appealed to the Court of Quarter Sessions for the county of Northampton against the said conviction, when we dismissed the said appeal, and confirmed the said conviction, subject to the following case.

CASE.

1. On Sunday, the 10th day of April last, two policemen watched the appellant's premises from 10.44 a.m. to 11.20 a.m., and during that time (thirty-six minutes) they saw eighty-five persons go into the yard of appellant's premises, and seventy-four leave, of whom sixty-six went towards Northampton, and eight towards Brafeld, in the opposite direction. All the eighty-five persons came from the direction of Northampton, and passed the front door of the appellant's premises, which opened upon the highway, and entered the appellant's premises by a gate which opened into a passage leading into the yard situate at the rear of the house, the said gate being about 36 feet from the back entrance of the appellant's house. The appellant explained that he used to allow Sunday travellers to use the house, but he found that they were then inclined to stay too long, so he only allowed them to use the yard, and further that, when the front door was used for entering the premises on Sundays, the travellers standing about the door used to block up the highway, so he kept this door closed. The said gate was not fastened, and neither the appellant nor anyone on his behalf stood at or near the gate, but only in the yard itself, to question persons so entering. All the seventy-four persons left the premises by the said gate. The policemen, who were well known to the appellant, then went into the yard, and saw more than fifty-seven men there, some of whom were drinking beer. In the yard itself, tables were spread upon tressels, and provided with forms as seats, and on the tables were spread quart and pint jugs, some containing beer. These tables and tressels and forms are not set out in the yard on week days.

2. One of the policemen upon entering the yard, asked the appellant how he accounted for so many persons being there, to which the appellant replied that they were all travellers, and asked them to give their correct names and addresses to the police.

3. Fifty-seven persons of those then in the yard thereupon gave their names and addresses to the police, which were admitted to be correct.

4. Of the persons exceeding 131 in number, who were during the time above mentioned in the appellant's yard, it was proved or admitted that, except four or five persons, who had come from Earl's Barton, a village above five miles away, all the persons were citizens from Northampton, a place from three and a quarter to three and a half miles distant, who had walked to the appellant's said premises, and not beyond that morning, and returned or were returning after taking beer and other refreshment. There was no evidence that any of these persons had stayed in the yard an unreasonable time, or had too much to drink, and they all went away in a quiet, peaceable, and orderly manner.

5. The appellant and his son were called as witnesses, and proved that Little Houghton is a village containing about 500 people, who were all well known to them. Many of the 131 persons who were in the yard were known to them as citizens from Northampton. Before any one was served with beer or other refreshment he was asked where he had come from and slept the night before, and that no one was allowed to have more than one pint of beer for refreshment, or to be served more than once. The appellant admitted that two waiters more than on a week day were employed by him on a Sunday to attend to customers.

6. It was contended for the appellant that he was bound to serve these men with reasonable refreshment, that the men were *bonâ fide* travellers, and that the law did not require the appellant to inquire into the motive of the men in coming to Little Houghton. It was contended on the other hand that the evidence showed that these persons were not *bonâ fide* travellers either for business or pleasure, but merely travellers for the purpose of obtaining intoxicating liquor.

7. We came to the conclusion that many of these persons had left their homes at Northampton in order to get some beer at Little Houghton, as they could not be served at Northampton, and we were of opinion that such persons were not *bonâ fide* travellers, and we were not satisfied that under the circumstances above mentioned the appellant truly believed that the said persons were all *bonâ fide* travellers.

8. The question of law for the opinion of the court is, whether under the circumstances above mentioned we were right in confirming the said conviction and dismissing the said appeal.

If we were wrong the conviction must be quashed and this

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appeal allowed. If we were right the conviction must be affirmed and this appeal dismissed.

The case had been previously argued before a divisional court consisting of Lord Coleridge, C.J. and Cave, J., but owing to the court being divided in opinion it was now re-argued by order before the present court.

Poland, Q.C. and Sills for the appellant.—The expression “*bonâ fide* traveller” is new in the Act of 1877, the previous Acts using the word “traveller” only. The decisions under these Acts are in favour of the present appellant. They are: *Atkinson v. Sellers* (32 L. T. Rep. O. S. 178; 28 L. J. 12, M. C.); *Taylor v. Humphries* (4 L. T. Rep. N. S. 514; 30 L. J. 242, M. C.; 10 C. B. N. S. 429); *Same v. Same* (11 L. T. Rep. N. S. 373; *Poploe v. Richardson* (L. Rep. 4 C. P. 168). These cases show that if a man starts for a walk, whether his object be business or pleasure, he is a traveller within the old Acts. [HAWKINS, J.—Suppose a man starts out to look for a public-house?] The magistrates cannot dive into a man’s mind. The same principle has been affirmed since the Act of 1874 in the case of *Oldham v. Sheasby* (60 L. J. 81, M. C.). There is great difficulty for the publican to judge of the motives of those who come to be served. These persons were travelling for pleasure, and no doubt they contemplated refreshing themselves with a glass of beer before returning. The question comes to this: Does a man who during closing hours starts to walk over three miles with the intent to get a drink cease to be a traveller? It is submitted he does not, the test being if his journey was undertaken either for business or pleasure as apart from the mere wish to drink.

Lloyd, Q.C. and Attenborough, for the respondents, were not called upon.

COLLINS, J.—The question in this case is, whether these persons who were served by the appellant with drink during closing hours on Sunday were *bonâ fide* travellers, and also whether the appellant was telling the truth when he said he believed that they were. The justices have found that the purchasers were not *bonâ fide* travellers, and were not satisfied that the appellant truly believed them to be so. I think the justices were right. In my opinion it must be a question of fact in each case whether the purchaser is a *bonâ fide* traveller or not. It is not enough for him to show that he has travelled three miles from where he lodged during the preceding night. What then is necessary to constitute a *bonâ fide* traveller? In my opinion it is the purpose for which the journey was undertaken. Now the justices have found that the purpose for which many of these persons had left their homes at Northampton was to get beer at Little Houghton, as they could not be served at Northampton. It appears to me that this must be the test of their being *bonâ fide* travellers, viz., what was the real object of their journey? If the journey was undertaken for pleasure, what form of pleasure was it undertaken

for? If for beer, then the purchaser is not a *bonâ fide* traveller. In this case I agree with the justices that the true object of these persons' journey from Northampton to Little Houghton was to get beer, and I therefore agree with the justices that they were not *bonâ fide* travellers. Now we have to consider whether the publican believed them to be *bonâ fide* travellers. It seems to me that, having regard to the facts, he could not have believed so, but that he came to the same conclusion as I do, namely, that they came Sunday after Sunday to Little Houghton because they could get beer there which they could not get at home. I think, therefore, this appeal must be dismissed.

DAY, J.—I concur.

CAVE, J.—I differ in this case from the rest of the court, and so I suppose I am wrong. Having heard the case argued once already, I did not require to hear Mr. Lloyd again, although my judgment is against him. I think this conviction is not a safe one. The appellant was convicted and fined 5*l.*, and the question is, whether there was evidence on which the justices could so convict him. The section of the Act is one to give rise to considerable doubt. [The learned Judge read sect. 10 and continued:] The expression *bonâ fide* traveller is not defined, and is calculated to cause some difficulty in the interpretation. The expression "traveller," however, has been defined by earlier Acts as one travelling either for business or pleasure. Now in that sense it is not doubted that the persons who were served with beer at Little Houghton were travellers. But when one comes to deal with the expression "*bonâ fide* traveller," I agree with the rest of the Court that it is a question whether in the main and upon the whole the object of these men's journey was to get beer or to take a walk. I do not wish to lay stress upon mere language. The Act, it is true, says that a man shall not be deemed to be a *bonâ fide* traveller unless he has travelled three miles, and these men did comply with that test. At the same time the Act does not make those who have travelled three miles *bonâ fide* travellers. The question, therefore, is a mixed one of law and fact. Assuming that they went to Little Houghton mainly to get beer, and if this fact had been proved in evidence, I should have agreed that the conviction was good. * But if they went out for a walk to enjoy the country air and the scenery, then I think that the fact that at the end of their walk they intended to have a glass of beer ought not to deprive them of the status of *bonâ fide* travellers. Now what is the evidence in this case? There is no evidence that any of these men remained in the yard an unreasonable time, or had too much to drink. If they had asked for a quantity of drink, and had sat drinking for some time, or behaved in a noisy and improper manner, all these circumstances might have been evidence that the purpose of their journey was to obtain drink. None of these circumstances are found here. What, then, led the justices to the conclusion to which they came? This is a criminal case, and demanded clear evidence. Apparently

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the only thing which led them to this conclusion was that there was a considerable number of persons purchasing beer, and that most of them went no further in their walk, but returned to Northampton. I confess that circumstance is not sufficient to convince me that their main object was to get beer. I think the other circumstances must be taken into consideration. The time at which they went out was a reasonable time for taking a walk. Their behaviour was orderly and proper, and they were not served with beer more than once, or with more than a pint each. All that the justices say is that their number was so considerable that some of them must have come with the object of getting beer. In my opinion the mere fact that there were 131 persons on the premises is not sufficient to justify such a conclusion, and if there was no evidence that they went out for any other purpose than to take a walk, the conviction ought not to stand. But then there is another branch of this case. The further question arises whether the publican truly believed that his customers were *bonâ fide* travellers. If they were he was bound at his peril to serve them. It would be very hard on travellers if he were not so bound. How, then, is he to be sure whether they are *bonâ fide* travellers or not? He may protect himself by asking them questions, and this he did. He may also take the precaution of serving them only once with drink, and that also was done in this case. It is said, however, that the questions he asked them are evidence of *mala fides*. Now, what were the questions? He asked them where they came from, and where they slept the previous night. It is suggested that he ought also to have asked them what they came for, and what was the object of their journey. But suppose he had asked them, "Why did you leave Northampton?" Can it be doubted that they would have said they came for a walk. Would he then have been bound to disbelieve them? No single person can be suggested who might not truthfully have given such an answer. Possibly some of them wanted the beer more than the walk. But how is the publican to know? He is liable on the one hand to be indicted if he wrongfully refuses to serve them. On the other hand he is liable to a fine of 5*l.* if they are not *bonâ fide* travellers. It appears to me that he asked all reasonable questions. Had he asked them what they came out for none of them would have been so foolish as to say it was to get beer. The only point of any value that I can find against the publican was the large number of the customers, and, as I have said, I think that is not enough. It appears to me, therefore, that not only was there no evidence to show that these persons were not *bonâ fide* travellers, but also that, under the circumstances, there were no grounds for holding that the publican did not believe them to be *bonâ fide* travellers. If convictions are to take place on such grounds the publican will say, "I will not serve anybody at all during these hours." I think that such a result as this was never contemplated by the Act. It is a construction of the statute, moreover,

which would press very hardly upon the working men in large towns, who could thus obtain no refreshment during their Sunday walk. For these reasons I am of opinion that the conviction should be set aside.

HAWKINS, J.—I concur in the judgment which is about to be given by my Lord.

LORD COLERIDGE, C.J.—This is a case in which the judgment delivered by my brother Cave will justify me in having caused it to be reargued before five judges, it being a case of great importance in which there is no right of appeal. I must disclaim at the outset going beyond the bounds of this case or entering into the motive with which this Act was passed. My duty is simply to construe the statute according to law, and whether it bears hardly upon the working man or not, I shall not be misunderstood when I say it is indifferent to me. I look upon the case simply as one of the interpretation of a statute. Now the justices have convicted the appellant of contravening sects. 9 and 10 of the Act 37 & 38 Vict. c. 49. Sect. 9 prohibits the sale of liquor during hours of closing, and imposes a penalty for doing so. Then the 10th section qualifies the 9th by permitting the sale to *bonâ fide* travellers at any time, and the concluding words of the section are as follows: "A person, for the purposes of this Act and the principal Act, shall not be deemed to be a *bonâ fide* traveller unless the place where he lodged during the preceding night is at least three miles distant from the place where he demands to be supplied with liquor." The only observation I would make upon that section is that it is a negative section. It does not say who shall, but who shall not, be deemed to be a *bonâ fide* traveller, and therefore it does not say that any person who has come three miles to the public-house is a *bonâ fide* traveller. It only says that unless he has done so he shall not be deemed to be one. Now, Northampton is a very large place, containing some 70,000 inhabitants, and about three miles distant is the village of Little Houghton, where a respectable public-house is kept by the appellant. It is found in the case that Sunday after Sunday a large number of people, relatively to the size of the village, came to this public-house during the hours of closing and were served with beer. It was further proved that with the exception of a very few all of them were artisans from Northampton who had walked to the appellant's premises that morning and no further, and returned, or were returning, after taking beer and other refreshment. Now, it is a singular thing, if they only went for a walk, that the terminus of their journey should always be the same. Moreover, the son of the defendant was called, and he proved that they knew who these men were. Is it unreasonable to suppose that they knew them as customers? Now, that being so, and it being further proved that the practice of this Sunday business was so established that two extra waiters had to be employed on Sunday, and that they were required not to supply the wants of Little

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Houghton, but at a time when but for *bonâ fide* travellers the house would have been closed and empty, was the conclusion arrived at by the justices a reasonable one? Having all these facts before them, they found as a fact that these men had not come out to take a walk, but in order to get beer which they could not obtain at home. Then it is said there was no evidence for the justices. I should have thought it was impossible to maintain such a proposition. Here was a whole organised system proved to exist, by which persons travelled three miles and then obtained, during closing hours, beer which they could not get at home. Is that *bonâ fide* travelling? In my opinion it is not. I cannot, of course, help knowing, as everyone knows, that near any great town this is a regular practice. But that is no reason why we should not declare the law as it is, and if it is to be altered to accommodate the practice this is not the place to do it. I think the Act as it stands was never intended to justify such a practice as is disclosed in this case, and to carry on a large and regular Sunday trade on pretence of supplying *bonâ fide* travellers is simply to set the Act at defiance. We are bound to maintain this Act as it stands so long as it remains a part of the law of the land, and I think the justices put the proper construction upon it. But there is a further reason in favour of this conviction. The case is concluded by authority. The principles upon which the decision ought to rest are clearly stated by Erle, C.J. in *Taylor v. Humphries* (11 L. T. Rep. N. S. 376) in these words: "We think that a person would be a traveller within the exception if he came abroad from any of the motives above suggested as legitimate and by reason thereof needed refreshment. But if he came abroad merely because he desired to go to a public-house and obtain drink he would not." And Cockburn, C.J. expresses the same principle in *Atkinson v. Sellers*. These cases contain an exposition of the old law as it then stood, and the only difference between the old and the present law is that for the word "traveller" is substituted the expression "*bonâ fide* traveller." In my opinion the principles contained in the cases just cited are equally applicable to the new expression. The other two cases cited for the appellant are quite distinguishable. The cases I have mentioned show, in my opinion, that the finding of the magistrates was on a question of fact, namely, whether the persons resorting to this inn systematically, Sunday after Sunday, were *bonâ fide* travellers or not. They found, most properly I think, that they were not, and that the publican did not truly believe they were, and I think their finding must be affirmed, and this conviction must stand.

Solicitors for the appellant, *Godden, Son, and Holme*, for *Becke and Green*, Northampton.

Solicitor for the justices, *E. E. Hobson*, for *Rawlins and Son*, Market Harborough.

QUEEN'S BENCH DIVISION.

Thursday, Oct. 27, 1892.

(Before POLLOCK, B. and HAWKINS, J.)

BARNES (app.) v. RIDER (resp.) (a)

Adulteration of milk—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6—Particulars of offence—Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 10.

Sect. 10 of the Food and Drugs Act Amendment Act, 1879, provides that in all prosecutions under the Sale of Food and Drugs Act, 1875, there shall be stated on the summons to appear before the magistrate "particulars of the offence or offences against the said Act of which the seller is accused."

A summons was served on the appellant, in which it was stated that he "on the 30th day of June, 1892, at Salford, in the borough aforesaid, did then and there sell to Henry Rider" (the respondent), "and to the prejudice of Henry Rider, one pint of milk, which was not of the nature, substance, and quality of the article demanded by such purchaser."

Held (reversing the decision of the magistrate), that the appellant could not be convicted, as the summons did not sufficiently state the particulars of the offence of which he was accused to meet the requirements of sect. 10; that the defect could not be cured by an oral communication to the appellant of the nature of the adulteration complained of; and that the appellant having appeared before the magistrate only to protest against his jurisdiction was not debarred from setting up the insufficiency of the particulars.

THIS was a case stated by the stipendiary magistrate for the county borough of Salford, the appellant George William Barnes being a dairyman, and the respondent Henry Rider being an inspector of nuisances, and an inspector appointed under the Sale of Food and Drugs Act, 1875, for the county borough of Salford.

The case was stated in the following terms:

1. The appellant was on the 16th day of July, 1892, served with a summons under the Food and Drugs Act at the instance of the respondent, of which so far as it is material to the case the following is a copy:

For that you, the appellant, on the 30th day of June, 1892, at Salford, in the borough aforesaid, did then and there sell to Henry Rider, and to the prejudice of Henry Rider, one pint of milk which was not of the nature, substance, and quality of the article demanded by such purchaser.

(a) Reported by MERVYN LL. PEEL, Esq, Barrister-at-Law.

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c. 63, s. 6;
42 & 43 Vict.
c. 30, s. 10.*

2. The appellant appeared on the said summons, and on the case being called on he, by his solicitor, objected that particulars of the offence against the aforesaid Acts of which the seller was accused were not stated on the summons in compliance with sect. 10 of 42 & 43 Vict. c. 30, and that the summons ought to have contained particulars of the alleged defect in the milk, or have stated in what manner it had been adulterated, as, for example, that water had been added or fat abstracted, or whatever the alleged defect might be, and he further contended that such non-compliance with the said section was fatal to the summons, and that the appellant could not be lawfully convicted thereunder.

3. The respondent's solicitor contended that the summons complied with the section, inasmuch as it gave particulars of the offence. The magistrate decided to hear the case, and reserve the point for consideration, and it was thereupon proved that the cause of complaint, viz., that the milk had been adulterated by the addition of water was communicated by the appellant to the respondent before the summons was issued, and he therefore held that the summons was good and sufficient within the said section, and fined the appellant 20s. and costs.

The question for the opinion of the court is, whether the magistrate's decision was right in point of law. If the Court should be of opinion that his decision was right, the conviction is to stand; if the Court should be of opinion that his decision was wrong, the summons is to be dismissed, and the case remitted to the magistrate with the opinion of the Court.

By sect. 6 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), it is provided:

No person shall sell, to the prejudice of the purchaser, any article of food or any drug which is not of the nature, substance, and quality demanded by such purchaser, under a penalty not exceeding twenty pounds.

Then follows a proviso for immunity in certain specified cases.

By sect. 10 of the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), it is provided:

In all prosecutions under the principal Act, and notwithstanding the provisions of sect. 20 of the said Act, the summons to appear before the magistrates shall be served upon the person charged with violating the provisions of the said Act within a reasonable time, and in the case of a perishable article not exceeding twenty-eight days from the time of the purchase from such person for test purposes of the food or drug, for the sale of which in contravention to the terms of the principal Act the seller is rendered liable to prosecution, and particulars of the offence or offences against the said Act of which the seller is accused, and also the name of the prosecutor, shall be stated on the summons, and the summons shall not be made returnable in a less time than seven days from the day it is served upon the person summoned.

A. T. Toller for the appellant.—The decision of the magistrate was wrong. There are no particulars stated on this summons to meet the requirements of sect. 10. [HAWKINS, J.—I am inclined to think that the summons was wrong; but then you appeared to it.] We appeared to it in order to take this objection, and our doing so could not convert a bad summons into a good one:

(*Dixon v. Wells*, 62 L. T. Rep. N. S. 812; 25 Q. B. Div. 249). [HAWKINS, J.—I am not sure that you are not right, if the appellant appeared merely for the purpose of saying that the summons was bad.] The appearance was under protest, and the defect therefore was not cured. But the question of waiver of jurisdiction does not arise, because it is necessary to the jurisdiction that there should be a compliance with the statute, *i.e.*, that there should be better particulars than those stated in the summons. The alleged offence was against sect. 6 of the Act of 1875, and the object of sect. 10 of the Amendment Act of 1879 is to see that the accused knows what charge he has to meet. The appellant here was not the man whose cows produced the milk; he had got it from a farm. How can a man who has got food, perishable food, from a wholesale dealer, and believes it to be right, possibly know how to have it tested and thus defend himself when the day comes, if particulars of his offence are not stated in the summons? It might be said here that the appellant knew the nature of the adulteration of which he was accused by reason of the communication which was made to him; but this is an important question of principle, and the effect of the statute cannot be taken away and its requirements avoided by anything outside the summons itself.

Smyly, Q.C. for the respondent.—I admit that the case of *Dixon v. Wells* (*ubi sup.*) is against me on the question as to the effect of the appearance, and the only point is whether the summons was defective. I do not think I can or ought to contend that the mere fact that the appellant was informed of the nature of the adulteration would make the summons good; but what I submit is, that the particulars of the offence itself are sufficiently stated in this summons to comply with the requirements of sect. 10. We have to give the particulars of the offence, not the evidence necessary to support them. The offence here is the selling an article other than that which was demanded, and the particulars of that offence are the date when the demand was made and the name of the person who made it, the article demanded, and the fact that it was not of the quality demanded. If we had to go into details on the summons we might be bound by our particulars, and if it turned out that 5 per cent. of water had been added, and we had charged seven, the summons would be dismissed. There is a note of a case, *R. v. Wakefield*, in 54 J. P. 148, where the summons did not give particulars as to how the milk was adulterated, but merely stated that the thing demanded was new milk, and it was held that it was for the justices to decide whether there were sufficient particulars. Here the magistrate has decided that the particulars were sufficient, and they were so in fact. In the cases of *Lane v. Collins* (52 L. T. Rep. N. S. 257; 14 Q. B. Div. 193) and *Knight v. Bowers* (53 L. T. Rep. N. S. 234; 14 Q. B. Div. 845) this objection was never taken, though this form of summons was used.

POLLOCK, B.—I confess myself I feel no doubt in saying that

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this case ought' to be sent back to the magistrate with the expressed opinion of this Court that the summons ought to have been dismissed. Here is a statute beginning with providing for a penalty in the case of a sale of goods that are adulterated or are not of the nature, substance, and quality of the article demanded by the purchaser. The Act is a very stringent one, because the person dealing in any article of food from the very necessity of the case, is made liable for the wrongful acts of other people, even though there is no actual commission or omission, or anything wrong on his part. Then there is a provision that when a person is summoned under this Act particulars should be delivered of the offence. I cannot myself think that the intention or meaning of the Legislature by this is, that merely the names and date and so forth should be stated, but it means particulars of the offence in the sense of what a man would say in answer to the question, What do you complain of? Such an answer would be, "You sold me milk with water in it"; or "you sold me milk of a particular kind when I asked for milk of another kind." It is most reasonable that a person summoned for a breach of this Act of Parliament should have information in the summons of what it is that is complained of. Mr. Smyly does not intend for a moment to argue that the mere verbal communication beforehand affects the matter. I think that the magistrate was wrong, and therefore the case must go back to him with the intimation from this court that the conviction is bad, and that the summons ought to be dismissed.

HAWKINS, J.—I am of the same opinion. I have already intimated my opinion in the course of the argument. I think, in the first place, that the mere communication beforehand of the particulars of the offence did not justify the magistrate in finding that the summons was good, because I think that the summons itself was defective because it did not set forth in the terms of sect. 10 the particulars of the offence. Those particulars are required to be stated on the summons. The offence that is stated on the summons in this case is "that you, the appellant, on the 30th day of June last, at Salford, in the borough aforesaid, did then and there sell to Henry Rider, and to the prejudice of Henry Rider, one pint of milk which was not of the nature, substance, and quality of the article demanded by such purchaser." Well, it is difficult to see how this can be read as anything more than a description of the offence itself, and without sect. 10, to which I have just referred, it would have been necessary to state some description of the offence to enable the man to know with what he was charged. Sect. 10 was passed, in my judgment, to enable him to have more information than that, and that he should have not merely a description of the offence, but particulars of the offence, and I do not think that this summons did give particulars, or anything which can be called particulars such as are required by sect. 10. But then I ask myself, can there be a previous verbal communication of the particulars

of the offence so as to make good the omission of them in the summons? I think there cannot be, because it is clear that the particulars must be on the summons itself. Then the appellant appeared before the justice for the very purpose of taking the objection that he had not been properly summoned. I think, there being no particulars of the offence stated in the summons, and nothing in this case to waive the absence of such particulars, that the magistrate ought not to have convicted the appellant, and that his appeal ought to be allowed.

Appeal allowed with costs.

Solicitors for the appellant, *Indermaur and Brown*, for *Gardner and Son*, Manchester.

Solicitors for the respondent, *Firth and Co.*, for the Town Clerk, Salford.

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CENTRAL CRIMINAL COURT.

(Before the RECORDER, Sir Charles Hall, Q.C.)

Wednesday, Feb. 8, 1893.

REG. v. BRITTON. (a)

Evidence—Perjury—Admissibility of statements made by judge of High Court in delivering judgment in action in which perjury alleged to have been committed.

Statements made by a judge in giving judgment in an action are not admissible as evidence in the prosecution of a witness for perjury alleged to have been committed whilst giving evidence in such action.

THE prisoner, Samuel Britton, was indicted for committing wilful and corrupt perjury while giving evidence in the course of an action (*Frankis v. Baverstock and Britton*) tried in the High Court of Justice, before Mr. Justice Romer, upon the 21st day of September, 1892.

E. U. Bullen (with him *G. A. Bonner*), in support of the indictment, after calling formal evidence to prove the proceedings in the action in the High Court, called a shorthand writer, who

(a) Reported by the Editor of *Cox C. O.*, from the Central Criminal Court Sessions Paper No. 700.

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produced a transcript of the notes of the evidence given by the prisoner upon the trial, and also a transcript of his notes of the judgment of Mr. Justice Romer in the action. Upon the notes of the judgment being tendered in evidence,

C. M. Mathews, on behalf of the prisoner, submitted that the words of the judgment could not be given in evidence, as the defendant had not had the opportunity of answering the learned judge.

Bullen, in support of the indictment, contended that the words of the judgment were admissible. But,

The RECORDER held, that what was said by the learned judge in delivering his judgment was not admissible evidence, and rejected the notes.

MIDLAND CIRCUIT.

LINCOLN.

Friday, Feb. 24, 1893.

(Before DAY, J.)

REG. v. BRACKENBURY. (a)

Evidence—Admissions obtained by questions by police—Admissibility of.

There is no rule excluding admissions made by a prisoner in answer to questions put by a policeman.

A fortiori, when the accused has not been actually taken into custody.

The ruling of A. L. Smith in Reg. v. Gavin (16 Cox C. C. 656) not followed.

THE prisoner in this case was charged with burglariously breaking and entering the dwelling-house of Caroline Gascoigne, at Welby, on the night of the 22nd January, 1893.

The prisoner was proved to have been seen in the house after the inmates had retired to bed, and on being seen he left the premises.

A hole was found in the roof the next morning, but nothing was missing.

(a) Reported by A. M. WHITE, Esq., Barrister-at-Law.

The prosecutrix communicated with the police on the morning of the 23rd, and shortly afterwards a policeman upon meeting the accused, a farm labourer, upon the highway, stopped him and said, "I am going to ask you some questions, and what you say may be taken down in writing, and might be used in evidence against you."

The accused then made several admissions, and on being further pressed with questions confessed he had been at Welby the previous night. The policeman then formally took him into custody.

H. G. Stanger, for the prosecution, proposed to put in as evidence the admissions so made.

Archer M. White, for the prisoner, objected that the accused was practically in custody, being restrained of his liberty. The policeman's act amounted to an imprisonment. The policeman had no right to ask questions, and under the circumstances the admissions so obtained were not admissible. He cited *R. v. Gavin* (15 Cox C. C. 656).

DAY, J. admitted all the statements made by the accused to the policeman, and expressly dissented from the ruling of A. L. Smith, J. in *R. v. Gavin*.

Verdict, Not guilty.

Solicitor for prosecution, *G. W. G. Beaumont*, Grantham.

Solicitors for prisoner, *R. A. White and Son*, Grantham.

Note.—This is in accordance with the rule laid down in nearly all the text books. 1 Taylor (1885), 756; Powell (1892), 316; Phipson, 157; Burn's Justice of the Peace (1869), 973; Archbold (1886), 262; Roscoe (1890), 48; and in 3 Russell on Crimes (1877), 472, 442, as to which see the remark of Coleridge, C.J. in *Reg. v. Fennell* (1881), L. Rep. 7 Q. B. 147. See also *Baldry's case* (1852), 2 Den. 430. The ruling of Smith, J., in *Reg. v. Gavin* is supported by *Reg. v. Devlin* (Irish), 1841; 2 Cr. & Dix. 152; *Reg. v. Beriman* (1854) 6 Cox C. C. 888; *Reg. v. Cheverton* (1862), 2 F. & F. 833; and *Reg. v. Bodkin* (Irish), 1863, 9 Cox C. C. 403. But according to the decision of the Court for Crown Cases Reserved in *Reg. v. Thompson*, post, p. 641; 69 L. T. Rep. N. S. 22, a confession of guilt in order to be admissible in criminal proceedings must have been made voluntarily, and not in response to any threat or to any suggestion of advantage to be inferred either directly or indirectly from language used by a person in a position of authority in connection with the prosecution of the person by whom the confession was made. In *Reg. v. Fennell* (*ubi sup.*), Lord Coleridge, C.J., said: "The rule laid down in 'Russell on Crimes' is that a confession, in order to be admissible must be free and voluntary, that is, must not be extracted by any sort of threat or violence, nor obtained by any direct or implied promise, however slight, nor by the exertion of any improper influence;" and in *Reg. v. Thompson* (*ubi sup.*), Cave, J., in delivering the judgment of the Court, said: "If these principles and the reasons for them are, as it seems impossible to doubt, well founded, they afford to magistrates a simple test by which the admissibility of a confession may be decided. They have to ask, is it proved affirmatively that the confession was free and voluntary—that is, was it preceded by any inducement held out by a person in authority to make a statement? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible."

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CENTRAL CRIMINAL COURT.

Thursday, April 13, 1893.

(Before the RECORDER, Sir Chas. Hall, Q.C.)

REG. v. ALTHAUSEN. (a)

*Evidence — Bigamy — Jewish marriage — Written contract — Insufficiency of proof of religious ceremony.**In order to prove a Jewish marriage, it is not sufficient to produce a witness who was present at the religious ceremony in the synagogue, a written contract between the parties being essential to the validity of the marriage, production and proof of the execution of such document is necessary.*

THE prisoner, Jacob Althausen, was indicted for bigamy, and in support of the indictment the following evidence was given by Abraham Rosenberg :—" I live at 7, Cross-street, Commercial-road, and am the father of Dinah Rosenberg. I was present at Czsne, in the province of Vilna, Russia, with my daughter Dinah when she was married to the prisoner about six years ago in a chapel adjoining the synagogue, where marriages usually take place. They were married by a rabbi, but not the Chief Rabbi. I am acquainted with the rites and ceremonies which take place at Jewish marriages. Those rites and ceremonies were observed at this marriage. After the marriage the prisoner and my daughter cohabited together, and after two weeks they came to England together, and I saw them living together. Dinah is still alive." Upon being cross-examined the witness said, " I saw a contract of marriage. The prisoner had the certificate at the time of the marriage. I did not see it; it was not read publicly in my presence. When Jews are married there is a document read publicly before them, but I did not hear one read in this case. I was present the whole time. I did not ask why it was not read.

Lily, on behalf of the prisoner, submitted the evidence was insufficient to prove that a marriage had been contracted according to the law of Russia, and relied upon *Horn v. Noel* (1 Camp. 61), which was tried before Lord Ellenborough, in which case the coverture of the defendant was set up as a bar to an action of *assumpsit* against her as acceptor of a bill of

(a) Reported by the Editor of Cox C. C., from the Central Criminal Court Sessions Paper No. 702.

exchange, and it was contended that it was necessary for the defendant, who was a Jewess, to show that a marriage had been celebrated according to the rites of the Jews. That with them what took place in the synagogue was merely a ratification of a previous written contract; and that such contract, being essential to the validity of the marriage, it ought to have been produced and proved, and this was accordingly done. He also cited *Lindo v. Denesano* (Hagg. 216) and *Reg. v. Collins* (Central Criminal Court Sessions Papers, Pt. 581, p. 545).

Geoghegan, in support of the indictment, submitted that there was some evidence, and it was therefore a question for the jury.

The RECORDER, however, held that he was bound by the case of *Horn v. Noel* (*ubi sup.*), that the evidence of what took place at the religious ceremony was insufficient, and in the absence of the written contract directed the jury to return a verdict of not guilty.

Not guilty.

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QUEEN'S BENCH DIVISION.

Thursday Feb. 2, 1893.

(Before LAWRENCE and BRUCE, JJ.)

STOKES, Inspector of Mines (app.) v. CHECKLAND (resp.) (a)

Mines—Use of naked lights in coal mine—Offence against Act—“Owner, agent, and manager” each liable—Managing director appointing a certificated manager—Liability of managing director as “agent”—Reasonable precautions by publishing rules—Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), ss. 49 (r. 8) & 50.

Sect. 50 of the Coal Mines Regulation Act, 1887, provides that, “in the event of any contravention or non-compliance with any of the general rules . . . by any person whomsoever, the owner, agent, and manager shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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means, by publishing and to the best of his power enforcing the said rules as regulations for the working of the mine, &c."

A limited company were the owners of a coal mine of which the respondent was the managing director; but the respondent did not interfere with the actual management of the mine underground, which was left in the hands of a duly certificated manager, under the Coal Mines Regulation Act, who was the manager of the colliery, and was in charge thereof. The respondent, as managing director, occasionally visited the mine, but he had in no way interfered with the manager in his duties, though he had authorised all necessary expenditure for the safety and conduct of the mine, and had duly published at the mine the rules under the Mines Act and the abstract of the Act itself. An offence having been committed by the use of naked lights in the mine on a day when the respondent was not at the mine:

Held, (1) that the respondent, as managing director, was "agent" of the mine within the meaning of the Act, and was legally responsible as such; but (2) that he had, by publishing and to the best of his power enforcing the rules as regulations for the working of the mine, taken all reasonable means—within sect. 50 of the Act—to prevent such contravention of the rules, and was therefore not liable to be convicted for the offence.

CASE stated by justices of the peace for the County of Derby, pursuant to sect. 33 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49).

At a court of summary jurisdiction holden in and for the division of Smalley in the county of Derby, on the 15th of September, 1892, at Ilkeston in the said county, an information preferred by the appellant against the respondent under sect. 49 (general rule 8) of the Coal Mines Regulation Act, 1887, was heard and determined by the justices, and upon such hearing the justices dismissed the information.

The following is a copy of the information in question:—

On the 6th day of August, 1892, Arthur Henry Stokes, of the borough of Derby, Her Majesty's Inspector of Mines for the Midland District, informeth me, one of Her Majesty's justices of the peace in and for the county of Derby, that George Edward Checkland . . . colliery owner, on the 9th day of May, 1892, he then being the owner or agent of a certain mine or colliery known as the Mapperley Colliery, situate in the parish of Mapperley in the county of Derby, and of which mine or colliery it was necessary to work the coal with safety-lamps in a certain part of a ventilating district of such mine or colliery—to wit, a district of the hard coal workings—did cause or permit the coal to be worked with naked lights in another part of the same ventilating district situated between the place where such safety-lamps were being used and the return airway, contrary to the provisions of the Coal Mines Regulation Act, 1887, &c.

The appellant being dissatisfied with the determination of the justices, obtained the present case.

Upon the hearing of the information, both parties were represented by their solicitors, and a preliminary objection was raised on behalf of the respondent that the information was bad,

inasmuch as it charged the respondent with an alternative offence as owner or agent, the liabilities imposed on the owner being different from those imposed on an agent by the said Act, and the justices being of opinion that the objection was good, amended the information, and thereupon the appellant proceeded against the respondent as agent only.

It was also proved by the appellant, and not disputed by the respondent, that on the date named in the information there was existing in the said colliery, in a district of the hard coal workings thereof, a fall of roof, that in consequence of such fall of roof there was an accumulation of gas on one side of it, and that men were working with naked lights on the other side of the fall in another part of the same ventilating district situated between the place where safety-lamps were being used and the return airway, contrary to the provisions of the Coal Mines Regulation Act, 1887, in such a portion; that if such fall had been removed, or if by any means a passage had been made through it, the gas on the other side of the fall would have reached the naked lights of the workmen and probably caused an accident, and it was not denied by the respondent that the using of naked lights on the date in question under those circumstances amounted to a breach of the Coal Mines Regulation Act, 1887.

It was further proved on behalf of the appellant, and admitted by the respondent, that a company called the Mapperley Colliery Company Limited, being a company incorporated under the Companies Acts, were the owners of the Mapperley Colliery as well as of other collieries elsewhere, and that the respondent resided at Thurnby Hall, near Leicester, and was the managing director of the Mapperley Colliery Company Limited, whose registered offices were at Halford-street, Leicester, where the business of the company was carried on.

At the close of the appellant's case it was contended on behalf of the respondent that on the facts so stated there was no evidence to justify the conclusion of the justices that the respondent was agent of the mine within the meaning of the Coal Mines Regulation Act of 1887, and that the fact that he was the managing director of the company was not in itself sufficient to warrant the justices in holding him to be such agent.

The justices overruled the objection, and held on the facts as stated that the respondent was an agent in respect of the Mapperley Colliery within the meaning of the Coal Mines Regulation Act, and thereupon it was proved to the justices on behalf of the respondent that, although he was the managing director of the Mapperley Colliery Company, he did not personally interfere with the management of the Mapperley Colliery, and was only consulted when any expenditure of capital was required, and that, although he occasionally visited the colliery to satisfy himself and his board of directors as to the nature of the management, yet he did not in any way interfere in the actual management of the colliery underground, which was left in the

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hands of a properly appointed and competent certificated manager duly appointed under the Coal Mines Regulation Act.

It was also proved on behalf of the respondent that on the date named in the information one John Turner, a duly certificated and competent manager under the Coal Mines Regulation Act, was duly appointed a certificated manager of the colliery, and was in charge thereof. And it was also further proved that a mining engineer of standing and repute had been appointed agent at the said colliery, and such appointment was duly notified to the appellant in the month of January, 1892.

The facts were in dispute as to whether or not this mining engineer had or had not ceased to act as agent on the date named in the information, but it was admitted by the respondent that he had subsequent to the commission of the said offences and before the hearing of the information, sent in an account from which it appeared that his services ceased on the 17th day of April, 1892.

It was also proved on behalf of the respondent that the rules under the said Mines Act, and the abstract of the Act itself, were duly published at the said colliery, that he had in no way interfered with the manager at the colliery in the performance of his duties, and had otherwise authorised all necessary expenditure for the purposes of the safety and proper conduct of the mine as required from time to time; and it was also proved by him that on the date named in the information he was not at the said colliery, but was at other places a long distance therefrom, and did not know the state of matters underground on that date.

The justices were of opinion that the respondent was legally responsible as agent, but according to sect. 50 of the Act, he had taken every reasonable precaution by appointing proper managers of the colliery, and they accordingly dismissed the information.

If the Court should be of opinion that the respondent, by appointing a properly certificated manager, had taken all reasonable means within the meaning of sect. 50 of the Coal Mines Regulation Act, 1887, then the decision dismissing the information is to stand; if on the contrary, it will make such order as it may deem fit.

Channell, Q.C., Montague Lush, and W. H. Griffiths, for the respondent.—There is a preliminary objection here to the hearing of this appeal. The justices dismissed the summons against the respondent, and we contend that the appellant, an inspector of mines, is not a "person aggrieved" within the meaning of sect. 33 of the Summary Jurisdiction Act, 1879. The meaning of the words "person aggrieved" was considered in the case of *Reg. v. The Justices of the County of London* (63 L. T. Rep. N. S. 243; 25 Q. B. Div. 357), in which it was held upon the same words that an informant whose complaint has been dismissed by the justices is not a "person aggrieved" so as to be entitled to appeal; in

other words, there is no appeal against an acquittal of the accused, and a prosecutor who fails in his prosecution is not a "person aggrieved." This case is stated under the Summary Jurisdiction Act, 1879, and the words there used are "person aggrieved," the very same words as those on which *Reg. v. The Justices of London* (*ubi sup.*) was decided. Now the surveyor of highways in that case is in precisely the same position in reference to highways as the inspector of mines is with regard to mines in this case. This case is not stated under the earlier Act, the 20 & 21 Vict. c. 43, in which the words were, not a person "aggrieved," but a person "dissatisfied." [BRUCE, J.—Then, if this case had been stated under the earlier Act, this objection would not arise at all."] No, because the words are different; there the words were "person dissatisfied," so that the prosecutor might have a case stated in case of an acquittal, though even then it would be open to argue the general principle that there cannot be an appeal against an acquittal. If the case had been stated under the earlier statute, there would have been a good deal more to be said for the argument. [LAWRENCE, J.—Under the earlier Act the words are "person dissatisfied."] Yes, but whether in that case on general principles an appeal would lie is not now the question, as this case is stated under the Act of 1879. For these reasons there is no right of appeal here at all.

Dalry for the appellant.—I admit that these appeals by inspectors are very important, but I was not prepared for an objection of this kind. It is admitted that, if this case had been slightly different in form, if it had referred to 20 & 21 Vict. c. 43, as well as the Summary Jurisdiction Act, 1879, there would have been no objection at all. Under the earlier Act the words were "either party may apply for a case, &c." The power to state a case under the Act of 1879 is really not an extension of this power under the old statute, but is rather wider under the later statute and enables a case to be stated which would not come within the 20 & 21 Vict. c. 43. I admit that it is stated on the face of the case that the case is stated under the Summary Jurisdiction Act, 1879; but if it were necessary, which I do not think it is, I should ask that that might be corrected. The court has full power to make any order it thinks right, and to make any variations it may think right in the case itself, or to send it back to the magistrates. The later Act of 1879 really so far adopts, and I might say incorporates, the earlier Act of 20 & 21 Vict., that it really has the same effect whether the case is stated under one Act or the other. According to the usual way of stating these cases, we constantly find a reference to 20 & 21 Vict. alone, sometimes to 20 & 21 Vict. and the Acts amending the same, sometimes to 20 & 21 Vict. and the Summary Jurisdiction Act, sometimes to the Summary Jurisdiction Act alone. It would be almost a calamity that a case like this, which has been carefully prepared and brought before the court, should be

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thrown over because one statute has been named instead of another. I am prepared to show that the case of *Reg. v. The Justices of London (ubi sup.)* is a very different one from the present.

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After some further argument the Court came to the conclusion that, without in the first instance deciding the objection raised, they would hear the case upon its merits.

Daddy for the appellant.—This is an appeal from the magistrates upon a case under the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58). The short point is this: an offence has been committed—there is no doubt about that—against the rules under that Act in this mine, and the question is whether the respondent was in such a position as agent that he could be convicted of that offence, the magistrates having refused to convict him. An offence has been committed under the Act in using naked lights which ought not to have been used; sect. 50 of the Act deals with that, and the point is really this: The Act contains in that section a provision that if in fact one of these offences against the Act has been committed, then the agent shall be liable unless he proves that he has taken all reasonable means to prevent it. That is really the point in the case, whether the magistrates ought not to have convicted this agent. Sect. 49, r. 8, provides that “no lamp or light other than a locked safety-lamp shall be allowed or used in any place in a mine,” and then it specifies that certain things shall be done where there is likely to be an escape of gas. Then the section contains a prohibition against working with naked lights in certain places. Now the information states that the respondent did cause the coal to be worked with naked lights contrary to that rule, and it charges him as owner or agent. In this case there was first of all the company with a managing director (the respondent), a certificated manager, and an engineer who had been appointed agent, but whose services had been dispensed with before this complaint. Therefore the question for the magistrates was: in this condition of things, the company, the managing director, who exercises general control over the colliery, the manager and agent—those three persons being on the scene, is not the managing director the “agent” for the colliery within the meaning of this Act? The magistrates held that he was. Was he agent, and did he show that he had used reasonable precaution to avoid the use of these lights? Going to the sections of the Act, sect. 20 points out what the position of a certificated manager is, and the mine cannot be worked without a certificated manager, who gets a certificate under the Act. Sect. 21 shows that there must be daily supervision of the mine either by the manager or an under-manager duly appointed by the owner or agent of the mine. Then the next section is sect. 49, r. 8, but nothing turns upon that now, as it is admitted that an offence was committed under the rule by somebody, and the question is by whom. Sect. 50 is the important one. Then sects. 59 and

60 provide for the penalties. Sect. 75 is the interpretation clause, and "agent" is there defined to mean "any person appointed as the representative of the owner in respect of any mine, or of any part thereof, and as such superior to a manager appointed in pursuance of this Act." Dealing with this point first, the magistrates have found—and it is a question of fact for them—that this gentleman was an agent. It is quite clear that he was the person appointed as the representative of the owner in respect of the mine. He was managing director in respect of that mine and the other mines which the company owned, so that I submit he was clearly appointed the representative of the owner, and as such superior to the manager. There is an unreported case of the Court of Queen's Bench in 1875, a decision of Blackburn, Mellor, and Quain, JJ., which shows that a managing director in this position is an agent. As to sect. 50, the question upon that is whether the mere fact that the respondent showed that he had appointed a certificated manager was sufficient to show that he had taken all reasonable means. Is it sufficient for the respondent—assuming him to be an agent—to show that he takes all reasonable steps merely by appointing a certificated manager? Now, as soon as we look at sect. 50, we see that it contemplates the existence of the three separate persons, all these at the same time, namely, the owner, agent, and manager, and it says that each of these shall be guilty of the offence. [LAWRANCE, J.—Will the agent get rid of his obligation by appointing a certificated manager?] I submit he must do more. [LAWRANCE, J.—If the owner can get rid of his liability by appointing an agent, why cannot an agent get rid of his liability by appointing a certificated manager?] As between the agent and the manager the agent's duty is a duty to do those things which are ordinarily done by a person who is in general control of the mine, as opposed to the duties of a working manager. A manager is like a foreman, bound to be there, or have an under-manager in his place; and under the Act there is a distinct set of duties in reference to the mine which have to be executed by the agent, and he has to show that he has done all he could do to prevent this state of things occurring. What would be the use of the section providing that an agent should be guilty of an offence when there is a manager, if it was meant that where there is a manager the agent was to have no responsibility? For these reasons I submit, first, that the respondent was an agent; and, secondly, that he did not take reasonable precautions within the section merely by appointing a certificated manager. He referred to *Baker v. Carter* (3 Ex. Div. 132); *Wynne v. Forrester* (40 L. T. Rep. N. S. 524; 5 C. P. Div. 361).

Lush (with him *Channell*, Q.C., and *W. H. Griffiths*), for the respondent, was not called on.

LAWRANCE, J.—In this case there is no doubt that the mode in which the question was raised by the magistrates was a very unsatisfactory way of raising the question. The concluding

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paragraphs of the case do not seem to me to contain all that is necessary for the purpose of deciding this question; but I do think we find enough in the case to enable us to come to a conclusion on it. Paragraph 9 is: "After hearing the argument on both sides we were of opinion that the respondent was legally responsible as agent, but according to sect. 50 of the Act he had taken every reasonable precaution by appointing proper managers to the colliery, and we accordingly dismissed the information." Notwithstanding the case cited by Mr. Daldy, of *Baker v. Carter* (*ubi sup.*), so far as I understand it from hearing it read, it almost establishes the fact that the appointment of a competent manager was sufficient. Almost, I say, but I am not dealing with that case, because I have not had an opportunity of looking into it, and I am expressly saying that I do not think that would be enough. In the other case that was cited, which also I have not had an opportunity of seeing, the case contains a good deal more than is contained in paragraphs 9 and 10 of this case. The magistrates put it in the same way again in paragraph 10: "If the Court be of opinion that the respondent by appointing a properly certificated manager had taken all reasonable means within the meaning of sect. 50 of the Coal Mines Regulation Act, 1887, then our decision dismissing the said information is to stand." If that was the sole question we had to decide, I should not be satisfied that that was enough; but I do not think that that is exactly what the magistrates meant, because I find that they do in another part of the case—although it is not well expressed—give sufficient facts which satisfy me at all events that the requirements of sect. 50 had been complied with, for they find facts which show what steps had been taken by the respondent: [Reads paragraph 11.] Now it seems to me that this is sufficient, because that is all that sect. 50 requires him to do. If any of the rules are contravened, you can come down on these people at once. It is not necessary to pick them out. It is for them to show that they are not liable. That is quite right, and persons would be considerably embarrassed to find a way to get evidence to show which of the three was guilty. You come down on them all, and each of them shall be guilty of an offence under this Act, unless he proves that he had taken all reasonable means, and it tells what the reasonable means are to be—that makes me say that that paragraph contains that which is not contained in the question itself put to us,—and these reasonable means are pointed out in the latter part of sect. 50, "by publishing and to the best of his power enforcing the said rules as regulations for the working of the mine, to prevent such contravention or non-compliance." That could not mean that the agent was not only to publish, but to go and be present in the mine, and see that the rules were carried out. The rules must be published in a particular place and in a particular manner; the Act must be there also, and I think must be signed also by the owner or the

agent and by the manager. It seems that all that was required by sect. 50 was there, and I think the magistrates have found that that was done by the respondent in this case, that he had done all that sect. 50 called upon him to do, and therefore that he has discharged himself from the onus thrown upon him by the section, and has shown that he had taken all the reasonable means by publishing and to the best of his power enforcing the rules as regulations. The only other case that was cited seems to be an entirely different case to this—the case of *Wynne v. Forrester* (*ubi sup.*). That was a case in which the agent had been acting for two days a week in the place of the certificated manager. He was held to be liable; and I should think properly held to be liable, but in the present case the position of the agent is very clearly defined. He is a person who is put forward by the owner, who is non-resident. He had the general supervision of the management of the mine. No doubt he attended to the business of selling coals. He seemed to be away on business, and merely supervised generally, that is to say, kept his eye on the mine. He took no part whatever in, and never interfered in the slightest degree with, the direction and business of the mine by the person who had been properly appointed—the certificated manager. Under these circumstances I think the magistrates came to a right conclusion on the facts. I think they were right in saying he was the agent, and that as such agent he discharged himself from any penalty.

BRUCE, J.—I am of the same opinion. I have felt considerably embarrassed by the mode in which the question was stated for our opinion, and if we were confined to the exact form in which the magistrates have stated the question for us, I should have very great difficulty, because I certainly am not of opinion that a respondent, as in this case the agent of a mine, discharges the responsibility which the Act imposes upon him simply by appointing a properly certificated manager. Having regard to the whole case, I think that what the magistrates meant to determine was this: that in this case the respondent had taken all reasonable means to discharge the responsibility which the Act placed upon him, and I think the real question we have to determine is whether there was sufficient evidence to justify the magistrates in coming to that conclusion—whether there was sufficient evidence for them to find that fact. I am of opinion there was evidence. I think that, where a person who is agent of a mine sees that a thoroughly competent manager is appointed; where he does as the agent in this case did from time to time, looks round the mine to see that the men are doing their best, not interfering with the other manager, but looking generally to see that all is going on well, and then takes means that a fund shall be provided for all necessary expenses for the purpose of safety, it seems to me that the magistrates on that evidence find that the agent does all that he reasonably can do to discharge the responsibility which the Act casts upon him. I regard this

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as a very different case indeed from *Wynne v. Forrester* (*ubi sup.*). If there had been any evidence here of any facts indicating danger—that any disregard of the rules had taken place, which had been communicated to the respondent,—I think he would have been bound then to take some definite means to see that measures were taken to avoid the danger, and enforce the rules more strictly in future, and he would not have discharged that obligation by merely telling the manager to see about it. I think there would have been a positive obligation thrown upon him to see that the particular mischief to which his attention was drawn was remedied, and he himself would have had the responsibility. There is no such evidence in this case. The magistrates thought he had taken all reasonable means by publishing the rules and enforcing them.

Judgment for respondent.

Solicitor for the appellant, *The Solicitor to the Treasury*.

Solicitors for the respondent, *Bell, Brodrick, and Gray*.

CROWN CASES RESERVED.

Jan. 21 and April 29.

(Before Lord COLERIDGE, C.J., HAWKINS, CAVE, DAY, and WILLS, JJ.)

REG. v. THOMPSON. (a)

*Evidence—Admissibility of confession—Inducement held out indirectly—Possibility of advantage to be inferred from language of person in authority.**A confession of guilt, in order to be admissible in evidence in criminal proceedings, must have been made voluntarily, and not in response to any threat or to any suggestion of advantage to be inferred either directly or indirectly from language used by a person in a position of authority in connection with the prosecution of the person by whom the confession was made.**In order to test the admissibility of a confession, the presiding judge should ask himself, "Is it proved affirmatively that the confession was free and voluntary—that is, was it preceded by any inducement held out by a person in authority to make a statement?" If the answer to such question be in the affirmative, and the inducement is not clearly shown to have been removed before the statement was made, evidence of the statement is inadmissible.*

(CASE stated for the consideration of this Court as follows :—

1. At the Westmoreland Quarter Sessions of the Peace, holden at Kendal on Friday, the 21st day of Oct, 1892, the above-named Marcellus Thompson was tried before me and the other magistrates of the county for embezzling certain moneys belonging to the Kendal Union Gas and Water Company, his masters.

2. The said William Dillworth Crewdson, at whose instance the warrant for the prisoner's apprehension had been issued, was called as a witness by the prosecution to prove, amongst other things, a confession of the prisoner.

3. As soon as the confession was sought to be put in evidence objection was taken to its admissibility, and we thereupon, before receiving further proof, allowed the witness to be cross-examined by prisoner's counsel. In answer to the latter's questions, the witness stated that, prior to the confession being

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

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made, the prisoner's brother and brother-in-law had sought an interview with him, and had come to see him, and that at this interview witness said to the prisoner's brother-in-law in course of conversation: "It will be the right thing for Marcellus (the prisoner) to make a clean breast of it." The witness: "I won't swear I didn't say it would be better for him to make a clean breast of it. I may have done so. I don't think I did. I expected what I said would be communicated to the prisoner. I won't swear I did not intend it should be conveyed to the prisoner. I should expect it would. I made no threat or promise to induce the prisoner to make a confession. I held out no hope that criminal proceedings would not be taken."

4. No evidence was produced to the court tending to prove that the details of the interview had been communicated to the prisoner, nor to rebut the evidence of Mr. Crewdson as to what took place at the interview.

5. It was then contended by prisoner's counsel, who relied on *Reg. v. Warringham* (2 Den. 447), *Reg. v. Bates* (11 Cox. 686), *Reg. v. Fennell* (7 Q. B. Div. 147), and other authorities, that the above statements to the brother were inducements held out to the prisoner to confess by a person in authority which rendered the evidence tendered by the prosecution inadmissible.

6. We found that the witness Crewdson was a person in authority, and we inferred that the details of the interview would be communicated to the prisoner. We found as a fact that the statements made by the witness were calculated to elicit the truth, and that the confession was voluntary, and we accordingly admitted the evidence.

7. The said witness then proved that, after the interview before referred to, he charged the prisoner with embezzling the company's moneys, and one of the directors told the prisoner he was in a very embarrassing position. The prisoner replied, "I know that; I will give the company all the help I can." He said, in answer to witness's charge, "Yes, I took it, but I do not think it is more than 1000*l*. It might be a few pounds more." No statement was made to the prisoner that the confession would save him from prosecution, no threat, and no promise given.

8. Subsequently the prisoner made out a list of moneys which he admitted had not been accounted for by him, which list we also admitted in evidence.

9. The prisoner was convicted, and sentenced to three years' penal servitude, which he is now undergoing.

10. The question for the opinion of the Court for Crown Cases Reserved is, whether the evidence of the confession was properly admitted. If the Court should be of that opinion the conviction is to be affirmed. If, on the other hand, the Court should be of opinion that such evidence ought not to have been admitted the conviction is to be quashed.

Jan. 21.—*Shee*, Q.C. (with him *Cavanagh*), for the prisoner, submitted that a confession to be admissible as evidence against

a defendant must be free and voluntary, and not induced by the promises or suggestions of a person in authority: (Russell on Crimes, p. 441; *Reg. v. Treadwell*, 7 Q. B. Div. 149.) The onus of proof that the confession was freely and voluntarily made lies on the prosecution: (*Reg. v. Warringham*, 2 Den. 447.) Here the statement in the case was, that Crewdson, one of the employers of the prisoner, said to the prisoner's brother-in-law, "It will be the right thing for Marcellus to make a clean breast of it." [HAWKINS, J.—Do not those words either hold out an inducement or constitute a threat? COLLINS, J.—There is a specific finding that "the words were calculated to elicit the truth."]

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Segar (with him *C. M. Wilson*) submitted, on behalf of the Crown, that the onus of proving that the statement of Crewdson was communicated to the prisoner lay on the prisoner: (*Reg. v. Garner*, 1 Den. 329; *Reg. v. Bate*, 11 Cox, 686.

[In the course of the argument a statement having been made that there was evidence at the trial of money having been paid on behalf of the prisoner into the account of the water company at the bank subsequently to the making of the confession, the Court were of opinion that the case should be sent back for such fact to be stated if it had been proved. The case was accordingly sent back to the quarter sessions to be amended.]

April 29.—The amended case now came on for hearing, the amendment consisting of the addition at the end of the original case of the following words:—

Amendment of the foregoing case made by the undersigned acting chairman upon conference with counsel for the prosecution and for the prisoner, in pursuance of the direction of the Court for Consideration of Crown Cases Reserved, "to amend it by setting out the whole of the evidence given at the trial of the prisoner, and especially stating if any money was paid either by the prisoner or his relatives to the prosecutor on behalf of the water company, or to any other person on their behalf either before or after the time of the confession."

A full copy of the chairman's notes of the evidence taken upon the trial (verbal corrections appearing in red ink) is sent herewith. (a)

The notes have been carefully read over to the counsel on both sides, and to the magistrates who heard the full case at the trial, two only being absent, and were accepted as sufficiently full and practically correct.

The only evidence that came before the court as to the repayment of moneys or suggestions of repayments was as follows, and in amendment of the case we add the two following paragraphs:

1. At a meeting of the directors on the 9th day of August, a question was asked by one of the directors (Mr. Pollitt) as to the

(a) As the evidence was not necessary for the judgment, it has been omitted.

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value of the stock on a farm at Matland occupied by the prisoner's brother, and it was suggested that a bill of sale over the stock should be given. The prisoner stated that the worth of the stock was over 1000*l.*, but that he could not accept the suggestion about the security without telling his brother. At the same meeting, prisoner said, "My brothers have got it (meaning the money). It has gone to pay interest on mortgages." Mr. W. D. Crewdson (the chairman of the directors) stated, "I never agreed not to prosecute if bill of sale given."

2. 340*l.* was received from the prisoner after the charge was made, also some money found in the cashbox, also the I O U for the sum of 25*l.* found in the cashbox. Of the sum of 340*l.*, 90*l.* was paid into the bank by the prisoner, 250*l.* by his brother. Mr. Crewdson stated that no arrangement was made as to the discrepancy being treated as a debt, and that the sum paid was simply by way of restitution.

Segar continued his argument, and submitted that the further statement of facts did not really alter the question whether or not the facts stated as to what took place previously to the confession did render such confession inadmissible in evidence. There were no doubt cases which showed that such words as "he had better make a clean breast of it" were enough to exclude a confession made in consequence of them. But here it was clear from paragraphs 3 and 4 of the case that it could not be found as a fact that the statement was ever communicated to the prisoner. Such a statement amounted to nothing more than a mere exhortation to speak the truth, and there were many authorities that such an exhortation cannot be construed as an inducement to tell a lie. There was no threat used here; all the overtures came from the prisoner and his friends. They were no doubt consistent with circumstances which, if proved to have existed, would have been sufficient to exclude the confession, but, no such circumstances being proved, the confession was admissible.

LORD COLERIDGE, C.J.—In this case we are all agreed that the conviction cannot be supported, and my brother Cave has written a judgment which we have all read, and with which we all agree.

CAVE, J. read the following judgment:—The question in this case is whether a particular admission made by the prisoner was admissible in evidence against him. This is a question which must necessarily arise for decision in a number of cases both at petty and quarter sessions, and to my mind it is very unsatisfactory that the principle which must guide the decision of magistrates in these cases should be loosely or confusedly interpreted. Many reasons may be urged in favour of the admissibility of all confessions, subject, of course, to their being tested by the cross-examination of those who heard and testify of them, and Bentham seems to have been of this opinion: (*Rationale of Judicial Evidence*, book 5, chap. 6, sect. 3.) But this is not the

law of England. By that law, to be admissible, a confession must be free and voluntary. If it proceeds from remorse and a desire to make reparation for the crime it is admissible. If it flows from hope or fear excited by a person in authority it is inadmissible. On this point the authorities are unanimous. As Mr. Taylor says in his *Law of Evidence*, part 2, chap. 15, sect. 872: "Before any confession can be received in evidence in a criminal case, it must be shown to have been voluntarily made, for, to adopt the somewhat inflated language of Eyre, C.B., 'a confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it,' and therefore it is rejected. The material question consequently is whether the confession has been obtained by the influence of hope or fear; and the evidence to this point, being in its nature preliminary, is, as we have seen, addressed to the judge, who will require the prosecutor to show affirmatively to his satisfaction that the statement was not made under the influence of an improper inducement, and who, in the event of any doubt subsisting on this head, will reject the confession." The case cited for this position is *R. v. Warringham* (2 Den. 457), where Parke, B. says to the counsel for the prosecution, "You are bound to satisfy me that the confession which you seek to use against the prisoner was not obtained from him by improper means. I am not satisfied of that; for it is impossible to collect from the answers of this witness whether such was the case or not." Parke, B. adds, "I reject the evidence of this witness, not being satisfied that it was voluntary." In *Reg. v. Baldry* (2 Den. C. C. 430) it is said by Pollock, C.B., that the true ground of the exclusion is not that there is any presumption of law that a confession not free and voluntary is false, but that it would not be safe to receive a statement made under any influence or fear. He also explains that the objection to telling the prisoner that it would be better to speak the truth is that the words import that it would be better for him to say something. With this view the statutory caution agrees, which commences with the words, "You are not obliged to say anything unless you desire to do so." These principles are restated and affirmed by the present Lord Chief Justice in *Reg. v. Fennell* (7 Q. B. Div. 147) in the following words: "The rule laid down in *Russell on Crimes* is that a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promise, however slight, nor by the exertion of any improper influence. It is well known that the chapter in *Russell on Crimes* containing that passage was written by Sir E. V. Williams, a great authority upon these matters." If these principles and the reasons for them are, as it seems impossible to doubt, well founded, they afford to magistrates a simple test by which the admissibility of a confession may be decided. They have to ask,

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Is it proved affirmatively that the confession was free and voluntary—that is, was it preceded by any inducement held out by a person in authority to make a statement? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible. In the present case the magistrates appeared to have intended to state the evidence which was before them, and to ask our opinion whether, on that evidence, they did right in admitting the confession. Now, there was obviously some ground for suspecting that the confession might not have been free and voluntary. Unfortunately, in my judgment, the magistrates do not seem to have understood what the precise point to be determined was, or what evidence was necessary to elicit it. The new evidence now before us throws a strong light on what was the object of the interview between Mr. Crewdson and the prisoner's brother and brother-in-law, why he made any communication to them, and why he expected what he said would be communicated to the prisoner. There is, indeed, no evidence that any communication was made to the prisoner at all; but it seems to me that after Mr. Crewdson's statement that he had spoken to the prisoner's brother and brother-in-law about the desirability of the prisoner's making a clean breast of it, with the expectation that what he had said would be communicated to the prisoner, it was incumbent on the prosecution to prove whether any, and, if so what, communication was actually made to the prisoner before the magistrates could properly be satisfied that the confession was free and voluntary. The magistrates go on to say that they inferred that the details of the interview would be (by which, I suppose, they intend to say that they inferred they were) communicated to the prisoner, which seems to have been the right inference to draw under the circumstances. They add that they found as a fact that the statements made by Crewdson were calculated to elicit the truth, and that the confession was voluntary. The first of these findings, if the ruling of Pollock, C.B., in *Reg. v. Baldry* is (as I take it to be) correct, is entirely immaterial. The second finding, if it is a corollary from the first, does not follow from it, and if it is an independent finding, is not warranted by the evidence: and as the question for us is whether this finding was warranted by the evidence, I feel compelled to say that, in my judgment, it was not. Taking the statement of Mr. Crewdson to have been "It will be the right thing for Marcellus to make a statement," and that that statement was communicated to the prisoner I should say that that communication was calculated, in the language of Pollock, C.B., to lead the prisoner to believe that it would be better for him to say something. All this, however, is matter of conjecture; and I prefer to put my judgment on the ground that it is the duty of the prosecution to prove, in case of doubt, that the prisoner's statement was free and voluntary, and that they did not discharge themselves of this obligation. I would

add that, for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which, nevertheless, are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but when it is not clear and satisfactory the prisoner is not infrequently alleged to have been seized with the desire born of penitence and remorse, to supplement it with a confession, and this desire itself again vanishes as soon as he appears in a court of justice. In this particular case there is no reason to suppose that Mr. Crewdson's evidence was not perfectly true and accurate; but on the broad plain ground that it was not proved satisfactorily that the confession was free and voluntary, I think it ought not to have been received. No other principle can, in my judgment, be safely worked by magistrates.

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Conviction affirmed.

Solicitor for the prosecution, *G. E. Cartmel*, Kendal.

Solicitor for the prisoner, *R. F. Thompson*, Kendal.

NOTE.—A further instance of the application of the principles enunciated in the foregoing judgment will be found in the direction of the same learned judge to the jury in *Reg. v. Male and Cooper*, *post*, p. 689.

QUEEN'S BENCH DIVISION.

Feb. 2 and 4.

(Before LAWRENCE and BRUCE, JJ.)

COLLINS (app.) v. COOPER (resp.). (a)

Markets and fairs—Fair, meaning of—Occupier allowing on his land swings, roundabouts, and other contrivance for amusement—No buying or selling on land—No payment to occupier—Walsall Corporation Act, 1890 (53 & 54 Vict. c. cxxx.), s. 126.

Sect. 126 of the Walsall Corporation Act, 1890, imposes a penalty upon any occupier of land within the borough who "holds or permits to be held any market or fair" thereon, without the licence of the corporation.

The defendant, being the occupier of certain land within the borough of Walsall, on certain days (one being a regular fair day) without the licence of the corporation, brought on to his

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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land and used certain swing boats, roundabouts, shooting galleries, and many other contrivances for the amusement of the people. These contrivances were the property of different persons, and it was not proved that such persons made any payment to the defendant for the use of the land, or that there was any buying or selling of goods, or exposing the same for sale thereon.

The defendant was convicted under the section of permitting the holding of a "fair" on his land.

Held, by Bruce, J., that he ought not to have been convicted, as the word "fair" in the section is used in its proper sense as a mart or gathering for the selling of goods, and would not include gatherings where amusements only were provided.

Held, by Laurance, J., that the defendant was properly convicted, as the word "fair" has a wider meaning than that of a fair in the ordinary sense as a place for buying and selling, and that, although buying and selling are the chief idea in the word, yet that it would include places where amusements of the kind in question were provided, although there was no buying and selling.

The junior judge (Bruce, J.) having withdrawn his judgment, the conviction stood.

CASE stated by the justices for the borough of Walsall, in the county of Stafford :—

An information was preferred by John Richard Cooper against Patrick Collins for that on the 24th, 26th, and 27th days of September, 1892, at the said borough, the said Patrick Collins, then being the occupier of certain land situate in the said borough, did unlawfully hold or permit to be held a fair on the said land without the licence of the mayor, aldermen, and burgesses of the said borough, contrary to the provisions of sect. 126 of the Walsall Corporation Act, 1890. And after hearing the said parties by their counsel and the evidence adduced by the prosecution, the justices did on the 3rd day of October, 1892, convict the said Patrick Collins, for that he being on the days aforesaid the occupier of the said piece of land did unlawfully permit to be held a fair on the same land without such licence as aforesaid, and contrary to the provisions of the said statute, and did adjudge that the said Patrick Collins should pay the sum of 5*l.*, and 11*l.* 7*s.* for costs, subject to this case, which was stated at the request of the said Patrick Collins.

In the borough of Walsall there are now held, and there have been held for many years past, three fairs in each year—namely, one on the 24th day of February, unless that day is a Sunday, and then on the following day, one on every Whit Tuesday, and the third on the Tuesday next preceding the 29th day of September. No evidence was laid before the justices as to the origin of such fairs or either of them, as to the time when such

fairs or either of them have been in existence, or as to the purpose for which they, or any of them, were established.

The fairs belong to the mayor, aldermen, and burgesses of the borough, and they are now regulated by the Walsall Improvement and Market Amendment Act, 1850, the Walsall Gas Purchase and Borough Extension Act, 1876, and the Walsall Corporation Act, 1890, which Acts are incorporated with the Markets and Fairs Clauses Act, 1847. The said Acts form part of this case.

The fairs belonging to the corporation as aforesaid were, prior to the passing of the Walsall Corporation Act, 1890, held on an open space forming part of a public highway called the Bridge, and the public highways contiguous thereto, and have been for many years past attended by shows, roundabouts, swings, shooting galleries, and other contrivances and things of a like character for the amusement and entertainment of the people attending the fairs. On the passing of the Walsall Corporation Act, 1890, the corporation granted licences from time to time pursuant to that Act for the said fairs to be held on land situate in Midland-road in the said borough.

The defendant Collins is the lessee for a term and the occupier of a piece of land containing 3000 square yards or thereabouts, situate in Shaws Seasowe, in the borough of Walsall, and on the dates in the next paragraph mentioned, he, by arrangement with the tenant, obtained the use and occupation also of an adjoining piece of land containing about 630 square yards, and the defendant is the owner of swing boats, roundabouts, and such like contrivances.

On the 24th, 26th, and 27th days of September (the last of such days being a regular fair day at Walsall) the defendant Collins, without any licence in that behalf from the mayor, aldermen, and burgesses of the borough, brought on to the said piece of land and used there the following swing boats, roundabouts, and other contrivances—namely, one engine for working an electric lighting apparatus, one cocoanut sheet, two stands used for throwing balls into tubs, two sets of swing boats, and one large roundabout (galloping horses), and also permitted divers other persons on the days aforesaid to bring and use on the said piece of land a large number of shows, shooting galleries, and other contrivances, such as swing boats, van, wild beast show, ghost exhibition, fine art exhibition, shooting ranges, "whoa Emmas" (that is, dressed female figures turning on a spindle and thrown at with sticks), large roundabout (galloping horses), one roundabout (cycles). These different contrivances were the property of different persons.

It was not proved before the justices that such persons, or any of them, made any payment whatsoever to the said Patrick Collins for the use of the said piece of land by them. It was not proved that any goods were exposed for sale, or that there was any buying or selling upon either of the said pieces of land

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upon the days aforesaid or either of them. It was proved that, on the said 24th and 26th days of September numerous stalls for the sale of estables, toys, and other articles, were placed on two adjoining public highways where the same abut upon the said pieces of land, and that sales took place therefrom until they were removed by the police on the last-mentioned day, but no evidence was given that this was with the consent or concurrence of the defendant.

It was contended before the justices by counsel for the defendant, that what took place as aforesaid upon the said land on the days mentioned was not in law evidence of the holding of a fair within the meaning of the 126th section of the Walsall Corporation Act, 1890.

The justices, however, held that a "fair" was being held on the said land, and that the defendant permitted it, and they convicted the defendant as aforesaid.

If the court should be of opinion that what took place upon the said land on the days aforesaid was not in law evidence of the holding of a fair within the meaning of the said section, then the conviction is to be quashed; otherwise it is to be affirmed.

Disturnal for the appellant.—The conviction of the justices in this case was wrong. The section of the Act under which the conviction took place is sect. 126 of the Walsall Corporation Act, 1890, which forbids the holding of a "fair" or "market" in any part of the borough without the licence of the corporation. Now, it is found in the case that there was no buying or selling on any of the days in question, and my proposition is that the very essential idea of a "fair" is that there should be buying and selling there. The earliest definition of the word "fair" is contained in Viner's Abridgment, and there, under the heading of "Markets and Fairs," we find the definition of the word "fair" given in this way: "A fair (from *forum* or *feriae*) is a great sort of market granted to any town, &c., for buying or selling, and for the more speedy and commodious provision of such things as the subject needs. It is usually kept once or twice in the year. A mart (*a merce* or *mercando*) is a great fair holden every year;" and market is defined thus: "A market (from *mercando*, buying or selling) is less than a fair, and granted to a town, &c., for the like purposes, but chiefly for the provision of such victuals as the subject wants. This is usually kept once or twice in the week, so that every fair is a market, but every market is not a fair." In Bacon's Abridgment, under the head of "Fairs and Markets" is given an account of the reasons for their institution, and it is said: "The first institution of fairs and markets seems plainly to be for the better regulation of trade and commerce, and that merchants and traders may be furnished with such commodities as they want at a particular mart, without that trouble and loss of time which must necessarily attend travelling about from place to

place ;" and the definition given under the heading " Fairs " in Wharton's Law Lexicon is to the same effect. All the older books go to show the same thing—namely, that the very essential idea of a " fair " is a place for buying and selling. Looking at the preamble of the Act—The Walsall Improvement and Market Amendment Act, 1850 (13 Vict. c. xv.)—we see the idea of fair there to be a place for buying and selling, for that preamble says : " Whereas markets or fairs for the buying and selling of live cattle, beasts, sheep, horses, pigs, and other animals have been and continue to be held in the said borough," and that the mayor, &c., of the borough claim to be entitled to have and receive tolls, &c., in respect of all articles and cattle, &c., exposed for sale in the said markets and fairs. The greater part of that Act of 1850 was repealed by sect. 16 of the Walsall Gas Purchase, &c., Act, 1876 (39 & 40 Vict. c. cxix.), but certain sections still remain. Coming now to the Act of 1890, the important sections are sects. 125 and 126. Sect. 125 provides as to tolls that the corporation may receive tolls from persons selling or offering for sale animals or articles in any market or fair in the borough, thus again showing that the " fair " referred to is a place for buying and selling. Then sect. 126 means that no person can hold a fair or market of his own without the licence of the corporation, and that if he does so he shall be liable to a penalty, and without such a section there would be no power to impose the penalty. The whole scope and object of these statutes is for the purpose of establishing conveniences of sale, and as the statute is a penal one it must be construed strictly. I submit that, on the facts as found, there is no evidence of the holding of a " fair " within the meaning of the Act.

Hugo Young for the respondent.—I do not contend that selling and taking tolls is not an important part of the idea of holding a fair. The question here is, was there any evidence at all of the holding of a fair, because, if there was any evidence of the holding of a fair, then the fact whether it was so held would be a question of fact for the justices. Referring to sect. 126, that cannot mean that nobody can be convicted under that section unless he holds a fair on the whole land, or holds a whole fair on his land ; but under that section, if a person holds a part of a fair on his land he is liable to be convicted. Are shows an essential part of the word " fair " ? I submit they are, and under sect. 125 the corporation are empowered to take tolls for the same. As to the meaning of the word " fair " originally, and how it has been dealt with in Acts of Parliament, " fairs " were originally meetings for festivals or public holidays, and then in later times people began to sell goods at such meetings. " Fair " is from *feriæ*, which means holidays, and there are some Acts that have been passed which seem to bear out that meaning. The meaning of the word " fair " does not necessarily connote buying and selling, and what I want to make out now is that when Acts

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of Parliament speak of the word "fair" they mean not only the buying and selling, but also all that was formerly included in the word "fair." I wish to refer to a public Act, namely, the Metropolitan Fairs Act, 1868 (31 & 32 Vict. c. 106) which is headed "An Act for the prevention of the holding of unlawful fairs within the limits of the metropolitan police district," and sect. 2 of that Act indicates that shows of the kind now in question may form a fair, as the section speaks of persons resorting to the ground "with any show or instrument of gambling or amusement." The preamble of the Fairs Act, 1871 (34 & 35 Vict. c. 12) says: "Whereas certain of the fairs held in England and Wales are unnecessary, are the cause of grievous immorality, and are very injurious to the inhabitants of the towns in which such fairs are held, &c." This preamble shows that fairs include not only places for buying and selling, but also shows and contrivances, such as those in the present case, and it would be these shows that, in the words of the preamble, would be the "cause of grievous immorality." As showing that the Legislature has made a distinction between "markets" and "fairs," I quote sect. 167 of the Public Health Act, 1875 (38 & 39 Vict. c. 55) which says that there shall be incorporated with this Act the provisions of the Markets and Fairs Clauses Act, 1847, "in so far as the same relates to markets," thus pointing out a distinction between fairs and markets as the Act is incorporated in so far as it relates to markets, but not as to fairs. This distinction, too, is admitted, because it has been said here that every fair is a market, though every market is not a fair. There is another series of Acts, namely, the Licensing Acts, which show the meaning of the word "fair." The 6 Geo. 4, c. 81, s. 11, speaks of the time of holding "any lawful fair or public races," thereby placing fairs in juxtaposition or comparison with public races, nothing being said in the section as to markets. So the 9 Geo. 4, c. 61 s. 36, speaks of the time and place in which is holden any "lawful fair," no mention being made of "markets." So the 24 & 25 Vict. c. 91, s. 13, speaks of "lawful fairs or public races," and further on of the selling of beer, &c., at "fairs or races" thus again omitting the word markets, and contrasting "fairs" with "races," and these special provisions "at fairs or races" are not repealed. So the 37 & 38 Vict. c. 49 (the Licensing Act, 1874), s. 18, speaks of persons selling intoxicating liquor in any place or booth within the limits of holding "any lawful fair or any races," thus mentioning the word "fair," but saying nothing about "markets." These examples all show the idea of amusements as being the idea of the word "fair," and show the idea that the Legislature, in using the word "fair" in conjunction with the word "races," used the word "fair" as a place of amusement, and not in the sense of a market. "Fair" is a place where sales often take place; originally it was a festival, a *feriæ*, or holiday, and here, when the Legislature use the word "fair" as they do in sect. 126 of the Act

now in question, they use the word in the wider and more comprehensive sense.

Disturnal in reply.

Cur. adv. vult.

Feb. 4.—The following judgment was read by

BRUCE, J.—In this case we are asked whether upon the facts stated there was evidence before the justices of the holding of a fair by the defendant in contravention of the 126th section of the Walsall Corporation Act, 1890. That section enacts in substance that if any person shall, without the licence of the corporation, on any land belonging to or occupied by him, hold, or permit to be held, any market or fair, he shall be liable to a penalty. The appellant, on the 24th, 26th, and 27th days of September 1892 brought on to land in his occupation in the borough of Walsall, a number of swings, roundabouts, shooting galleries, an electric light apparatus, a wild beast show, a ghost exhibition, a baby show, and various contrivances for the amusement of the people. There is no evidence that the appellant received any money for the use of the land by the proprietors of these contrivances, nor was there any evidence that any goods were offered for sale on the said land, or that there was any buying or selling of goods on the land. The justices, on this evidence convicted the appellant of holding a fair on the land. In my opinion, there was no evidence to justify this conviction. The word "fair," is a well known term in law, and it is, so far as I can ascertain, always used in connection with the buying and selling of merchandise, cattle, or other commodities. Lord Coke, in commenting on the Statute of Westminster the First, speaks of a mart as a fair, and he says that every fair is a market, but a market is not a fair. It is said in the report on charters and records relating to the history of fairs and markets in the United Kingdom, referred to in the report of the Royal Commission on Market Rights, that the only distinction between a market and a fair seems to be that fairs are larger than markets, and are held only on a few stated days in the year, whereas markets are held once a week or oftener. In the appendix to the report numerous instances are given of charters and records relating to fairs, and in all the cases that I can find the right to hold a fair is a right to hold a fair for the buying and selling of goods or cattle. There is one case alluded to in the report where the Abbot of Abingdon was, in the fourteenth year of King John, summoned to show what right he had in the fair of Ealingford, which the Earl of Albemarle said was to the damage of his fair of Wanting, and the Abbot pleaded that the gathering which he held was a wake, and not a fair; yet he admitted that there was always selling and buying there. But it is not only as a law term that the word fair is well defined; it is well recognised in ordinary language as a meeting of people for buying and selling. Allusion was made during the argument to Vanity Fair as described by Bunyan. He was a great master of English, and he

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describes the fair as "a fair wherein should be sold all sorts of vanity." Therefore at this fair are all such merchandise sold as houses, lands, trades, honours, preferments. No doubt, in connection with the great annual or quarterly fairs, amusements and sports were provided for the people; but these were merely incident to the business of the fair. In modern times the commercial importance of fairs has greatly diminished, and the amusements which accompany the holding of fairs often excite much more attention than the buying and selling. But it seems to me that this circumstance does not alter the meaning of the word fair. No doubt words may, and often do, undergo a change of meaning, and a word that was originally used to signify one thing may by usage come to be properly applied to something different. But I cannot find any authority for the use of the word fair as applied to a wake, or a show, or an exhibition. A cattle fair still means a fair where cattle are sold, a fancy fair where fancy articles are sold. There are many occasions where shows and exhibitions are gathered together—for instance, at horse-race meetings, at boat races, at great football matches, and other outdoor meetings: yet I think such gatherings cannot properly be spoken of as fairs. It is said that there are such things as pleasure fairs. I am not sure that there is any such phrase in common use. But if there is it can, I think, only mean a fair at which toys, trinkets, and such like articles are sold. The fair mentioned in the old song to which the young man went to buy blue ribbon for his sweetheart may have been a pleasure fair, but it was a fair at which blue ribbon was sold, and I suppose other like commodities. From what I have said I should think, if the word fair stood alone in the section of the Act of Parliament that it would not apply to a mere collection of contrivances for amusement. But the words used are "any market or fair," and although the word "or" is disjunctive, still I think it is interpretative or expository, and that the proximity of the word market emphasises the sense in which the word fair is used. But the general scope of the series of the Acts of Parliament relating to the markets and fairs of Walsall leave, I think, little doubt as to the meaning of the word in the section in question. There have been held at Walsall for many years three fairs a year, one on the 24th day of Feb., one on Whit Tuesday, and one on the Tuesday preceding the 29th day of Sept. These fairs and the markets held at Walsall have since the year 1848 been the subject of legislation. The Act of 1848 recites that "markets or fairs" for the buying and selling of live cattle, &c., have been and continue to be held in the borough on certain days in the year, and that the mayor, aldermen, and burgesses of the borough are entitled to receive stallage, piccage, tolls, &c., in respect of all articles and cattle, &c., exposed for sale in the said markets and fairs, and the Act gives power to the authorities of Walsall to take tolls in respect of marketable commodities specified in the schedule to the Act brought into the market-place, and to demand and take

certain tolls in respect of cattle, vans, booths, stages, shows, or swings brought into the "present cattle market." Another Act was passed in 1850 which repealed these clauses, and in substance re-enacted them in a slightly different form. The Act of 1850 defines the area of the cattle and pig market, and enacts that the corporation may take tolls from any persons who shall during any cattle market or fair bring into the defined area on any market or fair day any cattle or other live stock, or any vans, booths, stages, shows, and swings. An Act was passed in 1876 which does not affect the present question. The Act of 1890, the 126th section of which creates the offence charged against the appellant, contains in the 125th section an enactment that, in lieu of the tolls authorised by the Act of 1850, the corporation may receive tolls (not exceeding those specified in the schedule) from persons selling or exposing for sale animals or articles in any market or fair in the borough, or using or occupying any market premises. Then follow in the schedule tolls under three distinct headings—(1) tolls in the general market or fair; (2) fair; (3) tolls in the cattle and pig market. It seems to me to be clear from the way in which in these Acts of Parliament the tolls to be taken in respect of the market and the fair are mentioned that the word fair is used in its proper sense as a mart or gathering for the selling of goods, and I think we cannot give to the word fair in the 126th section a meaning different from that which it bears in the other sections of the same Act and in the earlier Acts, which must be used in connection with it. The whole drift of the legislation is, I think, the protection of rights in the nature of market rights. There was a point made by Mr. Young in his able argument to which I should refer. It was suggested that, even if the acts of the appellant in themselves did not constitute an offence against the section, yet, as there was some buying and selling by other persons on the public highways near to his land, that the whole might be taken together, and the shows and exhibitions brought on to his land by the appellant might, together with the buying and selling on the highway, constitute a fair. But it is expressly found by the case that the buying and selling on the highways did not take place with his consent or connivance, and in that case he cannot be rendered responsible for the acts of other persons. I have only to say that I think a different question would have arisen if the corporation had sought to recover from the appellant tolls in respect of the vans, stages, shows, or swings on his land. It is enough for me to say that that question is not before us, and I give no opinion upon it.

LAWRENCE, J.—I may say that I asked my brother Bruce to deliver his carefully written judgment first, to see if I could be convinced by his arguments, but I still differ from the conclusion arrived at by him. I take, if I may say so, a broader and wider view of the meaning of the word "fair." I quite agree that the chief idea in the word "fair" is that of buying and selling, but

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amusements have always been a consequence of people coming together for buying and selling, and the Legislature has interfered with some fairs which were pleasure fairs. I do not think that in this case it was intended that the Corporation of Walsall should have full control only over the business part of the fairs held therein. The question here is, whether the appellant, by allowing these contrivances and amusements on his land, was holding a "fair" on his land. I think he was, and I think that this was a "fair" in the ordinary sense of the word, and that therefore it was on the part of the appellant an interference with the rights of the Corporation of Walsall. I am of opinion, therefore, that this conviction was right.

The Court being divided in opinion, Bruce, J., being the junior judge, withdrew his judgment, and the conviction stood.

Conviction upheld, and appeal dismissed.

Solicitors for the appellant, *Bower, Cotton, and Bower*, for *John Cotterell*, Walsall, and *T. W. Wright*, Leicester.

Solicitors for the respondent, *Sharpe and Co.*, for *J. R. Cooper*, Walsall.

CROWN CASES RESERVED.

Saturday, April 29, 1893.

(Before Lord COLERIDGE, C.J., HAWKINS, CAVE, DAY, and WILLS, JJ.)

REG. v. HARRIS. (a)

Embezzlement—Servant—Deputy—Employment by overseer of person to collect poor rates and keep books—24 & 25 Vict. c. 96, s. 68.

A person employed to collect moneys which it is the duty of his employer to collect, but who is at liberty to collect such moneys as and when he thinks proper, is not a clerk or servant within 24 & 25 Vict. c. 96, s. 68.

In support of an indictment under that section for embezzlement it was proved that the prisoner had been employed by an illiterate overseer of the poor of a parish to collect the rates and keep the books, which it was the duty of such overseer to collect

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

and keep during a period of six months ; and that for so doing the prisoner was to receive the sum of 3*l*. During the six months the overseer gave no orders to the prisoner, and did not interfere in the collection of the rates or the keeping of the books ; and the prisoner at the expiration of the six months made default in accounting for certain of the moneys collected by him. The prisoner having been convicted of embezzling such moneys :

Held, upon a case reserved for the consideration of this court, that the prisoner was not the servant of the overseer within the meaning of the section, and was therefore wrongly convicted.

Reg. v. Bowers (L. Rep. 1 C. C. R. 41 ; 14 L. T. Rep. N. S. 671 ; 10 Cox C. C. 250 ; 35 L. J. 206, M. C. ; 12 Jur. N. S. 550 ; 14 W. R. 808) followed, but doubted.

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CASE stated by the deputy chairman of the Monmouthshire Quarter Sessions as follows :

Roger Morgan Harris was tried before me at the General Quarter Sessions of the Peace for Monmouthshire on the 4th day of January, 1893, upon an indictment which charged him with being employed as the servant of Eli Jones, and, whilst so employed, with having fraudulently and feloniously embezzled the sum of 30*l*. received by him on account of the said Eli Jones, his master.

The prosecutor, Eli Jones, a farmer, who could neither read nor write, was one of the overseers of the parish of Llanellen, in this county, and agreed with his co-overseers to collect the rates for the first half of the year, namely, from the 25th day of March to the 29th day of September, 1891. The prosecutor asked the prisoner what he would charge to collect and do the books. Prisoner agreed to do them for 3*l*. The prosecutor agreed to give him 3*l*. The prisoner took complete charge of the collection of the rates and keeping the books and application of the money received from the 25th day of March to the 29th day of September, 1891. There was no evidence that the prosecutor gave any orders to the prisoner or interfered in the collection of the rates and keeping of the books or application of the money. The prisoner had previously acted in a similar capacity for other overseers of the parish. The sum alleged to have been embezzled was proved and admitted to have been received by the prisoner, and to represent the balance of the rate which was received from the ratepayers for the six months in question, the other portion having previously been correctly dealt with by the prisoner. All the sums received by the prisoner in respect of the rates were entered in the books by the prisoner as received. On handing over the prosecutor's books to the other overseer the prisoner had stated to him that only a few shillings were due in respect of the rates from March to September, 1891, and it was not until shortly before the Government audit in June, 1892, that the said overseer was made aware

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of the deficiency by the prisoner informing him that a sum of 30*l.* had not been paid over by him at that audit. A balance-sheet was produced purporting to be signed by the prosecutor and the other overseer and one of the churchwardens, but, in fact, in the handwriting of the prisoner, which showed a balance due from the overseers of the 31*l.* 0*s.* 11½*d.* in question. The prisoner had paid 1*l.* 0*s.* 11½*d.*, leaving the sum of 30*l.* due. The audit was adjourned, and the prisoner had promised to attend the adjourned audit, and had failed to do so, and had repeatedly promised to pay over the sum in question, but had failed to do so. It was contended by counsel for the prisoner (1) that there was no evidence that the prisoner was a servant to the prosecutor within the meaning of the statute; (2) that the moneys were not the moneys of the prosecutor, but of the parish or of the board of guardians; that there was no evidence of any felonious intent.

I declined to stop the case, and the prisoner was convicted and sentenced to six weeks' imprisonment with hard labour, but admitted to bail pending a decision on the above points.

By 24 & 25 Vict. c. 96, s. 68, it is enacted that :

Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security, which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money, or security was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant, or other person so employed, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Marchant, on behalf of the prisoner, submitted that it was abundantly clear that there was no evidence from which a jury could infer that the prisoner was the servant of the prosecutor, inasmuch as the facts showed that a relationship existed between them which was inconsistent with that of master and servant. The prisoner was merely the agent or *locum tenens* of the prosecutor. No orders were given him, and the case found that he had the complete charge of the collection of the rates. The present case was governed by the decision of this court in *Reg. v. Negus* (28 L. T. Rep. N. S. 646; 12 Cox C. C. 492; L. Rep. 2 Cas. Res. 34; 42 L. J. 62, M. C.), where it was held that a person engaged to solicit orders for a firm, and paid by commission on sums received through his means, but having no authority to receive money was not a "clerk or servant" within 24 & 25 Vict. c. 96, s. 68, although he was not at liberty to employ himself for any other persons than the firm by whom he was engaged. In that case Bovill, C.J. said that "the test as to the relationship of master and servant used in many cases was to ascertain whether a person was bound to obey the orders of his employer so as to be under his employers' control;" and

Bramwell, B. said that, "looking to the principle, we find that the statute was intended to apply, not to cases where a man is a mere agent, but where the relationship of master and servant in the popular sense of the term, may be said to exist." In the present case the prisoner could not be said to be the servant of the prosecutor in the proper sense of that term, and was therefore wrongly convicted.

No one appeared in support of the conviction.

LORD COLERIDGE, C.J.—I confess that I give judgment in this case with reluctance, because my sense is offended by the notion that this man is not a servant. But I find that in *Reg. v. Bowers* (14 L. T. Rep. N. S. 671; 10 Cox C. C. 250; L. Rep. 1 Cr. Cas. Res. 41; 35 L. J. 206, M. C.; 12 Jur. N. S. 550; 14 W. R. 803), a case decided by five judges, a very strong court, Erle, C.J. takes the very point which is taken in this case. The facts in the two cases are not the same, but no facts are ever precisely the same. The court consisted of Erle, C.J., Martin, Bramwell, and Channell, BB., and Shee, J.; and Erle, C.J., in delivering the judgment of the court, said: "We are all of opinion that this conviction must be quashed. The facts stated fall within the cases cited, which decide that a person who is employed to get orders and receive money, but who is at liberty to get those orders and receive that money where and when he thinks proper, is not a clerk or servant within the meaning of the statute." Now, that is exactly what the prisoner here was to do; it exactly describes the nature of the employment, and we are not at liberty to overrule a case in a court of co-ordinate jurisdiction decided so recently as 1866. In deference to this decision, therefore, I am bound to say that this conviction cannot be sustained.

HAWKINS, J.—I share my Lord's regret that such a case is to be found. But we cannot overrule it, and therefore this conviction must be quashed.

CAVE, DAY, and WILLS, JJ. concurred.

Conviction quashed.

Solicitor for the prisoner, *Williams*, for *John Nesbitt*, Abergavenny.

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CROWN CASES RESERVED.

Saturday, June 17, 1893.

(Before Lord COLERIDGE, C.J., HAWKINS, MATHEW, CAVE, and DAY, JJ.)

REG. v. BELLIS. (a)

Children—Parent deprived of possession of child under fourteen by fraud—Fraud practised on mother and not on child—24 & 25 Vict. c. 100, s. 56.

In order to support a conviction under 24 & 25 Vict. c. 100, s. 56, for feloniously and unlawfully by fraud taking away a child under the age of fourteen years with intent thereby to deprive the father of such child of its possession, it is not necessary to prove that the fraud, by means of which possession of the child was obtained, was practised upon the child itself. Where, therefore, a prisoner had been convicted upon an indictment which charged her with such offence, it having been proved that possession of the child, which was of the age of eleven weeks, had been obtained by means of a fraud practised upon its mother, Held, that the prisoner had been rightly convicted. Dictum of Smith, J. in Reg. v. Barrett (15 Cox C. O. 658) dis-sented from.

THIS was a case stated by Williams, J. as follows :

Alice Bellis was tried before me at Ruthin, at the Spring Assizes, 1893, on an indictment which charged her that she did feloniously and unlawfully by force take away a child under the age of fourteen years, to wit, of the age of eleven weeks, with intent thereby then to deprive the father of such child of the possession of said child. There was a second count, which charged the same offence, substituting an allegation of taking away by fraud for the allegation of taking away by force.

The evidence showed that the prisoner took away the child by means of a fraud on the mother of the child, which fraud induced the mother to consent to part with possession of the child. It was contended, on behalf of the prisoner, by Mr. Trevor Lloyd, on the authority of the case *Reg. v. Barret* (15 Cox C. C. 658), that the force or fraud must have been exercised upon the child in order to bring the case within sect. 56 of 24 & 25 Vict. c. 100, but I thought that a taking away of a child by a fraud practised on a parent or

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

guardian was within the section, and so directed the jury, who convicted the prisoner, and I reserved this case for the opinion of the Court as to whether, under these circumstances, the case fell within the section so as to make the conviction right. I postponed judgment, and discharged the prisoner on recognisance of bail to appear and receive judgment.

Sect. 56 of 24 & 25 Vict. c. 100, enacts that

Whoever shall unlawfully, either by force or fraud, lead or take away, or decoy or entice away, or detain any child under the age of fourteen years, with intent to deprive any parent, guardian, or other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong, and whosoever shall, with any such intent, receive or harbour any such child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away, or detained, as in this section before mentioned, shall be guilty of felony.

No one appeared in support of or against the conviction.

LORD COLERIDGE, C.J.—In this case we have not had the advantage of hearing counsel; but we do not entertain the least doubt in the matter. It is an indictment of a person for taking away a child under the age of fourteen with intent to deprive the father of such child of its possession. That was the indictment, and the facts that were proved in support of it were that there was a fraud practised on the mother, and that the child was taken away by means of such fraud. But there is no doubt that the fraud practised was a fraud on the parent, and no fraud appears to have been practised upon the child. The case has been stated by my learned brother Williams because of what was said in *Reg. v. Barrett* (15 Cox C.C. 658). In that case my learned brother Smith said that force or fraud exercised upon any person other than the child taken or decoyed away would not constitute an offence within the section; that on reading the whole of the section, and especially the latter portion of it, the legislation seemed to have in contemplation a force or fraud perpetrated on the child himself, though the intent might be to practise another fraud on somebody else. Now the facts which were before him in that case were quite sufficient to justify the finding that there had been no force or fraud on anybody. The child had consented, and no fraud on anyone else was proved, so that there had been no fraud on anybody. But when my learned brother went further and laid down as a general proposition that the fraud under the section must be a fraud on the child, I respectfully differ from him. In many cases the child taken away must be of such tender age as would render it absurd to say that there must be a fraud practised on it. The decision or general dictum is far too wide, and it appears to have been quite unnecessary for my learned brother to have gone so far. From the terms in which the case is stated, his decision was, so far as the case then before him was concerned, quite correct, and I doubt if what he said can have been correctly reported. It was that dictum, however, which gave rise to this case, and, in our opinion, if this case is

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Children —
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within that dictum, then that dictum is too wide. On the other hand, if this case is not within it, then we are of opinion that it was not necessary that there should be fraud practised on the child in order to bring the case within the section, and the conviction must therefore be affirmed.

Conviction affirmed.

QUEEN'S BENCH DIVISION.

Wednesday, May 31, 1898.

(Before MATHEW AND WRIGHT, JJ.)

APLIN v. PORRITT AND OTHERS. (a)

Cruelty to animals—Rabbit coursing—Wild rabbits kept in confinement—Domestic animals—Cruelty to Animals Acts, 1849 (12 & 13 Vict. c. 92) and 1854 (17 & 18 Vict. c. 60).

Wild rabbits caught in nets and confined for five or six days in boxes, and kept alive by being fed are not domestic animals within 12 & 13 Vict. c. 92, and 17 & 18 Vict. c. 60.

The coursing of such rabbits in an inclosure is therefore not cruelly torturing animals within the meaning of sect. 3 of the Cruelty to Animals Act, 1849.

THIS was an appeal on a case stated by justices.

This case raised a question whether the sport of "coursing" rabbits comes within the penal provisions of the Cruelty to Animals Acts (12 & 13 Vict. c. 92, and 17 & 18 Vict. c. 60). The magistrates thought not, on the ground that the rabbits could not be considered as "domestic animals" within the Act, but stated a case to raise the question. At a Petty Sessional Division at Tynemouth, Porritt, and Allen, and Bentley, miners; Logan, a barman; and an innkeeper of the same name, were charged, on the information of Aplin, for that they had caused a number of rabbits to be cruelly ill-treated and tortured under these circumstances: They, with a number of other persons, assembled in a field and took part in coursing with dogs

(a) Reported by G. H. GRANT, Esq., Barrister-at-Law.

certain rabbits—i.e., wild rabbits, which had been caught in nets and confined in boxes, and had come into the possession of the men five or six days before the day of the coursing, and, while in their possession, had been fed by them. On the coursing day they were taken one by one out of the boxes, and were liberated in the field and then chased or coursed by dogs, none of them succeeding in escaping, and after being bitten and worried by the dogs, they were thrown to one side, and in many instances left alive in a mutilated and worried condition. It was contended on the part of the prosecution that the rabbits at the time of the coursing were no longer wild animals, but were domestic animals, they having been reclaimed from their original state of freedom, deprived of their liberty, brought under the dominion and control of man, and dependent upon him for subsistence. On the part of the men it was contended that wild rabbits caught and confined for five or six days and fed by men were not domestic animals, and that they were still *feræ naturæ*. The magistrates said that they had no doubt that the men did cause the rabbits to be cruelly ill-treated and tortured, but, being of opinion that the rabbits were not “domestic animals” within the meaning of the Act, they dismissed the information, and stated a case upon which the question of law raised was whether the rabbits at the time of the coursing were “domestic animals” within the meaning of the Act.

By the Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92) it is provided as follows :

Sect. 8. If any person shall cruelly beat, ill-treat, overdrive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, overdriven, abused, or tortured, any animal, every such offender shall for every such offence forfeit and pay a penalty not exceeding 5*l*.

Sect. 29. The word “animal” shall be taken to mean any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog, cat, or any other domestic animal.

By the Cruelty to Animals Act, 1854 (17 & 18 Vict. c. 60), it is provided as follows :

Sect. 8. The words and expressions to which a meaning is affixed by 12 & 13 Vict. c. 92, and which are introduced into this Act, shall have the same meaning in this Act, and the word “animal” shall in the said Act and in this Act mean any domestic animal, whether of the kind or species particularly enumerated in clause 29 of the said Act, or of any other kind or species whatever, and whether a quadruped or not.

Smyly, Q.C. (*Colam* with him) appeared on behalf of the appellant.—The justices were wrong in the view they took, and they ought to have convicted. These rabbits had become domestic animals. An animal becomes domestic when thoroughly within the power of man. In this case the rabbits had been kept for several days in confinement, and had been fed by the defendants, and so had become domestic animals within the meaning of the Cruelty to Animals Acts. The whole object of those Acts was to afford protection to those animals which had been deprived of their natural powers of defence by being

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captured and placed at the mercy of and under the power of man. *Colam v. Paget* (12 Q. B. Div. 66; 48 J. P. 263) is an authority in support of this contention, and is to be distinguished from *Swan v. Saunders* (50 L. J. 67, M. C.). These rabbits would be the subject of larceny at common Law: (Hawkins's Pleas of the Crown, book i., c. 33, s. 41, vol. 1, p. 215.)

No one appeared on behalf of the respondents.

MATHEW, J.—The decision of the justices was right, and must be upheld. In my opinion this case is a very clear and plain one, and I do not think it necessary to give a very lengthened judgment. If we were to hold that these rabbits were domestic animals within the meaning of the Cruelty to Animals Act—which I am of opinion we cannot do—then a bag fox or rats kept in a cage for the purpose of being destroyed by dogs would also be domestic animals. It would be impossible for us to distinguish one case from the others. Under the circumstances I regret that we cannot afford protection to these animals, but the law does not enable us to do so. Judgment must be entered for the respondents.

WRIGHT, J.—I am entirely of the same opinion.

Solicitor for the appellant, *A. Leslie*.

QUEEN'S BENCH DIVISION.

April 12 and 13, 1893.

(Before POLLOCK, B. and KENNEDY, J.)

CARTER (app.) v. THOMAS (resp.). (a)

Assault—Protection of property from fire—Statutory fire brigade—Control of premises during a fire—Member of volunteer fire brigade excluded by member of local board fire brigade—Authority to exclude public—Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 32—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171.

By sect. 171 of the Public Health Act, incorporating sect. 32 of the Towns Police Clauses Act, 1847, it is provided with respect to fires that an urban local authority "may employ a proper

(a) Reported by G. H. GRANT, Esq., Barrister-at-Law.

number of persons to act as firemen, and may make such rules for their regulation as they think proper."

The respondent, a member of the fire brigade established under the above section by the local board of Hounslow, was stationed at the gate of a house in which the brigade was engaged in extinguishing a fire, with instructions from the foreman to allow no person to pass through.

The appellant, a member and wearing the uniform of a volunteer fire brigade of Hounslow, the foreman of which was already upon the burning premises, endeavoured to force his way in for the purpose of helping to extinguish the fire, and in so doing assaulted the respondent.

Held, that there was no right in the appellant, as one of the public, to assist in putting out the fire; and, further, that the authority conferred upon the fire brigade of the local board by the above sections extended to excluding from the premises persons whose presence might impede the work of extinguishing the fire.

CASE stated by justices.

The appellant was convicted of an assault upon the respondent.

At the hearing it was found as a fact that the respondent was a member, and in the uniform of, the fire brigade provided by the Heston and Isleworth Local Board, under the provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171, incorporating sect. 32 of the Towns Police Act, 1847 (10 & 11 Vict. c. 89), and that the appellant was a member, and in the uniform of, a fire brigade called the Hounslow Original Fire Brigade, formed in the district, and supported by voluntary subscriptions and donations from various insurance companies. Sect. 32 of the Towns Police Act incorporated as aforesaid, provides that the local board "may employ a proper number of persons to act as firemen, and may make such rules for their regulation as they think proper."

It was also found that the respondent, when the alleged assault was committed, was at a fire which occurred in a house in the Inwood-road, Hounslow, in pursuance of his duty as a member of the Local Board Fire Brigade, and that Frank Marsham, the foreman, was also present in charge of such brigade, and that the respondent received instructions from his foreman not to allow anyone to pass in at the gate of the house where the fire occurred. It was also admitted that the foreman of the appellant's brigade was in the house at the time the appellant presented himself for admission, that the appellant was at the time in uniform, and that when he arrived at the gate he asked the respondent to allow him to pass; that the respondent thereupon told him the orders he had received from his foreman, and refused to allow him to do so; whereupon the appellant

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stated the respondent should not stop him, and pushed the gate and struggled with the respondent to get in, and tried to throw him over. This was the assault complained of. It was admitted that no more force was used by the appellant than was necessary to enable him to pass the respondent and enter the premises.

It was contended on behalf of the appellant that he had a right as against the respondent to go into the house, and that the justices had no jurisdiction to try what it was contended was a *bonâ fide* question of right.

It was further contended, on behalf of the appellant, that the respondent had no legal right to prevent him entering the house, and that he was justified in using sufficient force to enter the premises.

The justices, being of opinion that the respondent, acting under the orders of his foreman, who at the time was the officer in charge of the brigade of the properly constituted local authority—namely, the Heston and Isleworth Local Board, who, by statute, were authorised to provide and keep engines and firemen, and which brigade the justices considered was the proper one to take charge of any fire that should occur in its district—had full authority to prevent any person from entering the premises in question without the sanction of the officer in charge of the brigade at the time, who in this case was the foreman Marsham, convicted the appellant.

The questions for the opinion of the court were: (1) Whether the justices had jurisdiction to try the case, the appellant having set up an alleged *bonâ fide* claim of right. (2) Whether any member of the fire brigade provided by the local board had any authority, by statute or otherwise, to prevent a member of any other fire brigade from entering premises at which there was a fire for the purpose of assisting in extinguishing the same.

Alfred Lyttelton for the appellant.—In the first place the justices had no jurisdiction to convict the appellant. It is to be assumed that the appellant was acting *bonâ fide* in the belief that he had a right to help to extinguish the fire. Consequently there was no *mens rea* which is essential in cases of assault, and the defendant having made a *bonâ fide* claim of right, the jurisdiction of the justices was ousted: (*Watkins v. Major*, 33 L. T. Rep. N. S. 352; L. Rep. 10 C. P. 662. *White v. Feast*, 26 L. T. Rep. N. S. 611; L. Rep. 7 Q. B. 353.) Secondly, the assault was justified, as the respondent had no authority to exclude the appellant, and it is found that the appellant used no unnecessary violence. At common law there was a general right to assist in extinguishing fires. See *Mauleverer v. Spinke* (Dyer, 36 b), where it is said, “a man may justify pulling down a house on fire for the safety of the neighbouring houses.” The Police Clauses Act gives no authority to prevent volunteers from helping to put out a fire. Such authority is given to the Metropolitan Fire Brigade by sect. 12 of 28 & 29 Vict. c. 90; and the Legislature having this Act before their eyes when they

passed sect. 171 of the Public Health Act, 1875, must have intended, by reverting to the Police Clauses Act, to withhold such authority from the local fire brigade. In this case both parties were licensees, and one had no right to exclude the other.

Craies, for the respondent, was stopped by the Court on the question of the jurisdiction of the justices. The question is, whether the local board brigade had authority by statute or otherwise to exclude volunteers from the burning premises. Under the Public Health Act, 1875, it is clear that the local authority were intended to have some positive duties with regard to fires. Thus by sect. 66 they are given duties as to providing fire-plugs. By sect. 32 of the Police Clauses Act, incorporated in sect. 171 of the Public Health Act, they may "employ a proper number of persons to act as firemen, and may make such rules for their regulation as they think proper." When a power such as this is given by statute everything necessary for the proper exercise of the power is also given by implication. Thus in *Re Corporation of Dudley* (8 Q. B. Div. 86), it was held that a power given to a public body to make sewers implied a right to subjacent support for such sewers. From the case it appears that the fire brigade provided by the local authority under the statute were in charge of the fire, and there is no evidence of any licence to the appellant from the owner of the house. The appellant has committed an assault, and can only justify it by showing that he had a right to come on the premises.

POLLOCK, B.—The question which arises in the first place is as to the position of the fire brigade provided by the local board who came to put out the fire, and under what circumstances they were upon the premises. It would not be correct to say that they were in possession, for the question does not in my view depend upon priority. It depends upon the construction to be put upon the Acts of Parliament giving authority to the Local Board Fire Brigade. That brigade is established under the Public Health Act, 1875 (38 & 39 Vict. c. 55), sect. 171 of which incorporates sect. 32 of the Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89). By this section power is given to the local board to purchase or provide engines for extinguishing fire; and then further powers are given in these words: "and may employ a proper number of persons to act as firemen, and may make such rules for their regulation as they think proper." Therefore it is clear that the local board might have made certain rules for the guidance of their firemen. In the present case, however, none appear to have been made. The question therefore turns upon the construction of the words, "may employ a proper number of persons to act as firemen." In my judgment the expression "act as firemen" need not be confined to acts immediately connected with putting out the fire, such as pumping water or filling buckets, but may reasonably extend to acts done to facilitate the work, such as excluding persons whose presence would be a

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hindrance. In this case there is no direct evidence before us as to the conduct of the owner of the house, but I think it appears that the magistrates must have inferred that he allowed the local board brigade to come upon the premises. Then the respondent received orders from his foreman not to allow any person to pass the gate. The appellant, however, tried to pass. He was a member of another fire brigade, not however acting under the statute, and wore their uniform. We may assume, therefore, that he had the *bonâ fide* intention of helping to extinguish the fire. But when he was told that he could not enter, he assaulted the respondent in order to effect his purpose. The next question is, what right had he so to act? There is no question here of *mens rea*; that would be a matter for the magistrates to find if they thought it necessary. But in this case it is for the appellant first to show that he was prevented from doing some act which he had a legal right to do. There is no evidence that he was invited by the owner to enter the premises, but it is contended that as the foreman of the brigade to which he belonged was already on the spot, it is to be inferred that the appellant was there by invitation. I can draw no such inference, nor did the magistrates. I think the appellant had no legal right to be there, and that the powers given to the local board brigade would extend to the right to exclude persons who, in the opinion of the foreman, would hinder the putting out of the fire. The justification offered therefore fails. That disposes of the case as far as the statute is concerned. But I should go further, and, assuming that the first fireman was in the house by invitation of the owner, while the second came without being forbidden, but also without being invited by the owner, the same result would follow. The second comer would have no right to attack a person already in possession. The first reason I have given for my judgment is probably that by which the magistrates were influenced, and it is, I think, in accordance with law and convenience. The general question as to the right of the public to assist in putting out fires does not in my view arise here, and need not be discussed.

KENNEDY, J.—I will add only a few words on the second point, the question as to ouster of jurisdiction being, I think, unarguable. The other point stands thus: The appellant assaulted the respondent, who was engaged by the public authorities for the express purpose of extinguishing a fire. The appellant had no public position, and was not invited on to the premises by the owner. It is true he had a uniform on, but so might anyone else in Hounslow, where the fire occurred. It would come, therefore, according to the appellant's contention to this, that any person in Hounslow had a right to go into this house and interfere with those who were already there by invitation of the owner trying to put out the fire. I say by invitation of the owner, because I infer that the fire brigade of the local board had been sent for by the owner, and invited to come on the premises. Then what possible title had this volunteer to force an entrance? I can conceive of

circumstances where such an act might be justifiable, as, for instance, for the purpose of saving life, or if there was an insufficient number of firemen to cope with the fire. But here there is no suggestion that the force at the disposal of the fire brigade was not sufficient, and no evidence that the foreman was not perfectly right in thinking that it would be a wise and proper thing to exclude an irruption of other persons, who came there with good intentions, but unnecessarily and without authority from the owner. I think, therefore, that the assault cannot be justified, and that the appeal fails.

Solicitors : for the appellant, *Charles Robinson and Co.* ; for the respondent, *Hugh R. Peake.*

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c. 55), s. 171.

QUEEN'S BENCH DIVISION.

Wednesday, June 7, 1893.

(Before MATHEW and WRIGHT, JJ.)

BOWYER (Officer of Inland Revenue) (app.) v. THE PERCY SUPPER CLUB LIMITED (resps.). (a)

Licensing Acts—Proprietary club—"Sale" of liquor by proprietor to member—Excise Acts (6 Geo. 4, c. 81, s. 26; 4 & 5 Will. 4, c. 85, s. 17; 23 Vict. c. 27, s. 19).

A proprietary club was carried on by a limited company. At the beginning of the book of rules it was stated that the club being proprietary neither the committee nor members incur any liability beyond their annual subscription of two guineas, all such liability devolving on the company. Under the rules the company had the sole management of the club, both as to its property and its funds, and all the drink and liquor at the club belonged to the company and not to the members, and all profit from sales of drink and other articles, and from the carrying on of the club went to the company. The club was under the management of a committee of members in whom was vested the election of members. Under one of the rules the appellant, who was not a shareholder in the company, was elected by a sub-committee, as honorary member pending inquiries, and this rule

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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stated that honorary members so elected should have, pending their election by the committee, the same privileges as members. The appellant paid his subscription, and was then, while honorary member, supplied with beer, wine, and spirits, for which he paid, and which he consumed on the premises. The appellant was afterwards rejected as a member and his subscription returned. The company had no licence for the sale by retail of liquors to be consumed on the premises or otherwise.

Held, that, upon the above facts, there was a sale by the company by retail of the beer, wine, and spirits supplied to the appellant, within the meaning of the Licensing Acts, and that a licence to the company to sell such liquors by retail was necessary.

CASE stated by Mr. Hannay, metropolitan police magistrate, sitting at Marlborough-street Police-court.

The respondent company appeared before the magistrate to answer three informations exhibited by the appellant, an officer of Inland Revenue, prosecuting by order of the Commissioners of Inland Revenue, for that the respondent company did (1) on the 16th day of Oct. 1892 retail certain spirits, to wit, one gill of whisky, without having in force such a licence as by the statute in that behalf was required, and (2) did on the same day sell a certain quantity of beer, to wit one pint of beer by retail to be drunk and consumed in and upon the premises where sold without having an excise retail licence in force authorising the respondent company so to do; and (3) did on the same day sell certain wine by retail, to wit, one gill of port wine, without having a proper licence duly authorising the respondent company so to do.

The learned magistrate dismissed all three informations subject to this case.

The proceedings on the three informations were for recovery of three separate penalties imposed by the Excise Acts (6 Geo. 4, c. 81, s. 26; 4 & 5 Will. 4, c. 85, s. 17; 23 Vict. c. 27, s. 19) in respect of the sale by retail of spirits, beer, and wine respectively without the excise licences required for the sale thereof. The penalty in respect of the sale of spirits without licence is 50*l.* under sect. 26 of the Act 6 Geo. 4, c. 81; the penalty in respect of the sale of beer without licence is 20*l.* under sect. 19 of the Act 4 & 5 Will. 4, c. 85; and the penalty in respect of the sale of wine without licence is 20*l.* under sect. 17 of the Act 23 Vict. c. 27. The present duties of excise on licences for the sale by retail of beer, wine, and spirits are imposed by sects. 41, 42, and 43 of the Inland Revenue Act, 1880 (43 & 44 Vict. c. 20)

The respondent company is an incorporated company under the Companies Acts, 1862 to 1890, and was registered in October 1891 with a nominal capital of 5000*l.*, in shares of 1*l.* each, and a registered office at 12, Percy-street, Tottenham-court-road, in the county of Middlesex. The objects set forth in the memorandum of association for which the respondent company was

established were: (1) to enter into and carry into effect an agreement dated the 24th day of Sept. 1891, made between one Mr. Dolaro and a Mr. Noakes, as trustee for the company for the purchase of the business of a club proprietor, carried on by the said Dolaro, at 12, Percy-street; (2) to establish, maintain, and conduct a club for the accommodation of members of the company and their friends; (3) to carry on the said business and all other trades or businesses which the company shall from time to time consider can be conveniently carried on in connection with the existing or future business.

The respondent company has a banking account in its own name, which was opened in October 1891, and was regularly operated upon down to the hearing of the informations. Considerable sums of money passed through this account, and the cheques of the company on the said account were signed by Rosa Dolaro, manageress, and W. Noakes, secretary.

From the return of the shareholders in the company, it appeared that 500 shares were allotted to, and held by, Dolaro, and that he holds one other share, and that seventy-eight other shares have been allotted to and are now held by fifteen other persons, of whom seven hold ten shares each.

The company carry on the Percy Supper Club.

A book of rules of the Percy Supper Club Company Limited was given in evidence on behalf of the respondent company. On the first page of this book there is a printed memorandum as follows:

The Percy Supper Club Company Limited is established for the association of ladies and gentlemen belonging to the theatrical or musical profession who desire the numerous social advantages to be derived from a first-class club. This club being proprietary, neither members nor committee incur any liability or responsibility whatever beyond their annual subscription, all such liability devolving on the proprietary company.

The rules of the club—which was carried on at 12, Percy-street—so far as they are material for this case are as follows:

(1) That this club shall be under the management of a committee of members in whom shall be vested the election of members and additional committee-men when necessary.

(2) The annual subscription shall be 2 guineas for gentlemen, payable in advance on the 1st Jan. in each year. In all cases ladies can only be elected honorary members of the club.

(3) On the election of each member, the secretary shall notify the same to them and furnish them with a copy of these rules, on receipt of which and payment of subscription they shall be considered as distinctly implying their acquiescence in and submission to the rules of the club, and as the payment of the said subscription will admit them to all the benefits of the club, so on no account shall a member be entitled to use the club or to any privileges thereof until his first subscription be paid.

(4) Each candidate must be proposed by one member, and seconded by another, and their names then submitted to the committee, who will have the power of accepting or refusing such candidate.

(16) In order to facilitate the election of candidates it shall be competent for the committee to appoint a sub-committee of not more than five or less than three of their body, who shall have power to elect candidates as honorary members pending their election as members by the standing committee, such honorary members to have the same privileges for the time being as though they had been elected members.

(20) The club house shall be open from twelve mid-day until two a.m., but should

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several members desire to remain after that hour, they may do so by permission of the manager.

(22) The proprietary company shall have the sole and entire management of the club as well with respect to the hiring or purchasing of suitable house furniture and other things as are usual and necessary for a club of the like description, as also the management of the funds and property of the club, and shall have the exclusive right of appointing the bankers, secretary, and servants of the club, or removing such and of prescribing their respective duties

(24) The manager shall have the power to make from time to time such bye-laws (subject to the approval of the committee) as he may consider necessary for properly regulating and conducting the business of the club.

On the 16th day of October, 1892, the appellant, who was neither a member of the club nor a shareholder in the respondent company, visited the premises of the club in company with another person who was neither a member nor a shareholder. The appellant asked for a cigar, and his companion asked for whisky, but the barman in charge asked if they were members, and on being told they were not, he refused to supply them. They then went into another room and asked for champagne, but were again refused for the same reason. The secretary then called their attention to a notice posted up in the club rooms as follows :

Notice. Visitors are informed that under no circumstances whatever can they pay for refreshments. By order of the committee.

The appellant then offered to become a member, and the secretary said that would be best. The appellant then, on a form of proposal, wrote an assumed name and address, and then gave this form to the secretary, and at the same time paid him the two guineas in cash as his subscription. The appellant was then called to the table by Mr. Dolaro, and told that inquiries would be made, and if they were satisfactory he would be elected a member. He then went to the refreshment bar and called for drink, and the attendant at the bar was told he was a member by a gentleman behind the table. After that he was supplied with whisky and port wine, and paid for them. The appellant was again called to the table by Mr. Dolaro, who said that the three or four gentlemen were members of the committee, and that, pending inquiries, he was elected an honorary member by this sub-committee, under rule 16. The appellant then returned to the counter, and called for whisky and beer, and paid for them. These liquors were consumed on the premises by the appellant. There was not any excise licence in force for the sale of spirits, beer, or wine, at the premises, 12, Percy-street.

About a fortnight after the date of his election as honorary member, the appellant received a letter from the secretary of the club, informing him that he had not been elected a member of the club, and returning the two guineas he had paid pending his election as a member. The cheque inclosed in this letter was drawn upon the respondent company's account, and it was admitted that it was payable out of that account.

It was proved that all the drink and liquor at the premises of the club belonged and belongs to the respondent company, and

that all the profit from such sale and from the carrying on of the club went to the company.

It was contended on behalf of the appellant that the establishment of a so-called club at the respondent company's premises was merely an attempt to cloak the unlicensed sale of intoxicating liquors, and that such unlicensed sale by the respondent company to any person, whether a member of the club or not, is contrary to law.

It was contended on behalf of the company that the appellant having been duly elected an honorary member of the club, the company were not liable upon the informations; that being a *bonâ fide* club the company were entitled, under the circumstances and facts proved, to supply the appellant with liquors.

The following cases were cited before the magistrate: *Graff v. Evans* (46 L. T. Rep. N. S. 347; 8 Q. B. Div. 373); *Newman v. Jones* (55 L. T. Rep. N. S. 327; 17 Q. B. Div. 132); *Evans v. Hemingway* (52 J. P. 134); *Newell v. Hemingway* (16 Cox C. C. 604; 60 L. T. Rep. N. S. 544; 58 L. J. 46, M. C.); *Stevens v. Wood* (54 J. P. 742); *Baird v. Wells* (63 L. T. Rep. N. S. 312; 44 Ch. Div. 661); *Firmin v. International Club* (5 Times L. Rep. 694).

The magistrate found as a fact that the respondent company did carry on and manage the club for their profit, and that the company, on the 16th day of October, 1892, had no licence for the sale by retail of spirits, wine, or beer, whether to be consumed on the premises or otherwise.

The magistrate said that he was unable to draw any distinction between a proprietary club carried on by a company and one carried on by an individual; and that, if a licence were necessary in this case, all proprietary clubs would be brought within the Licensing Acts; and seeing that in no case that could be cited had it been held to be a "sale" to supply drink for money to members of a club, he dismissed the summonses, the evidence, in his opinion, excluding the inference that this was a pretended or "bogus" club, namely, a place where liquor can be obtained on payment by members and non-members indiscriminately. The question for the opinion of the court was, whether the magistrate's decision was correct in law, and whether the respondent company was under the circumstances guilty of the offences charged in the informations; also, if it was competent for the magistrate to state the question, having regard to the fact that the respondents had not requested him in writing so to do—whether an information for penalties lies against an incorporated company.

Poland, Q.C. and Danckwerts for the appellant.—This is not the case of a members' club, where it has been held that the property of the club is jointly owned by all the members of the club, and that, therefore, when any member of the club calls for any excisable article and gives money for it, it is partly his own property, and he gives money to replace that property, and it has been decided that that is not a sale, but merely an arrange-

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ment among the members to replace the property. This is a different case altogether, as this is a trading company, and our contention here is that in the case of a proprietary club, where the owner is carrying on business for his profit, and is the owner of the liquor, he cannot sell that without a licence. There are authorities for that proposition. The magistrate was under the impression that proprietary clubs do not require licences, and then he says this is not the less a proprietary club because it is a corporate company; but that is begging the whole question. If a man establishes a place of business, and is the buyer of excisable articles and becomes the owner of them, and arranges with other people that he will only sell those liquors to persons who are elected by a committee to use that clubhouse, that is a different thing altogether; but the magistrate seems to have assumed that clubs where a private individual sold liquors did not require a licence, and he says, if so, a corporate body does not require one. We submit that, upon the broad general view of the case without any question, proprietors of these clubs are liable, though the Excise may or may not choose to enforce penalties against the proprietor of a club, when the business is carried on very much like an ordinary members' club. A person cannot escape from the Excise laws merely by framing a series of rules and allowing persons to use premises under those rules. It is perfectly clear that the owner of the article who hands the article over through his servant to a person, should have a licence; it is goods sold and delivered. The proprietor of the club has bought with his money or with his credit the spirits, &c., and as soon as those things are delivered to his premises they are his property. Then how does the property pass from him, except in exchange for money, which is, in plain terms, a sale? If that is so, then the Acts say that no person shall sell spirits, &c., without a licence. If this had been the case of one person instead of this company, it would have been a sale, and the case is wholly distinguishable from the cases in which it has been held not to be a sale if persons who are members of a club and are the joint owners, buy through their committee wine, beer, and spirits, and make an arrangement amongst themselves that, when any member calls for any part of the property which has been purchased, liquor should be given in exchange for money. [WRIGHT, J.—Are there any authorities or cases on the question before us as to these proprietary clubs?] The nearest case is the case of *Graff v. Evans (ubi sup.)*, but that is not a case of a proprietary club. It was the case of an ordinary members' club, and it was considered that the goods belonged to the members of the club, out of whose money the drinks had been purchased. [WRIGHT, J.—That is not a case of a proprietary club.] No. The principle in that case broadly stated is that it is in substance a sale. That case has been confirmed in *Newman v. Jones (ubi sup.)*, which was a members' club. There the steward of the club sold to a person who was not

a member, but the trustees of the club were held not to be liable, as the steward had sold against their orders. Then there is a case of *Evans v. Hemingway* (*ubi sup.*), where there was what appeared to be a club, but Evans was the real proprietor, and there the court said, as the liquor did not belong to the members of the club, but really belonged to the proprietor, Evans was liable. No doubt it was found in that case that there was not a genuine club, but still there was something in the nature of a club, and the person held to be liable was the owner who had sold the liquor in exchange for money. The ground of that decision was that Evans was the real proprietor. The present point has never really been decided, as it has never yet arisen. Then there was the case of *Baird v. Wells* (*ubi sup.*), which was the case of a club called the Pelican Club. There the club was a members' club, and one of the members had been turned out of the club, and he asked the court to interfere by injunction, and Stirling, J. there pointed out that a member of a members' club has certain rights, but that with regard to a proprietary club it is the proprietor's property, and a member cannot come and ask the court to interfere, as in the case of a members' club. [WRIGHT, J.—Suppose this club requires every member to be a shareholder, would that make a difference?] We should say not, but that is not this case. Here the Excise officers who went there were not shareholders, and the great majority of members were not shareholders. We contend that this question of proprietary clubs is entirely distinguishable from the case of members' clubs, and we say there can be no answer to the question. When you once have got a legal owner of the liquor, then the property in that liquor passes. How does it pass? The owner does not give it away. It passes by a contract of sale, which is carried out by delivery and for the profit of the person. A man might say, "I will not drink this now, but will take it home and drink it at home to-morrow." The old form of action in that case would be for goods sold and delivered, for the property passes the moment the money is paid and the goods handed over, and is not that a sale? They also referred to *Newell v. Hemingway* (*ubi sup.*).

Crump, Q.C. (E. U. Bullen with him) for the respondents.—I submit that this is not a case falling within the Licensing Acts, although it may have to be provided for by the Legislature. The Licensing Acts are directed to the sale by retail in houses of public resort. The Licensing Act of 1872 (35 & 36 Vict. c. 94) is now the governing Act upon the point. I propose to use the line of argument used by Lord Herschell in the case of *Graff v. Evans* (*ubi sup.*), that the Act of Geo. 4, and the Acts of Victoria all refer to the licensing of houses of public resort, and the argument I put forward on the policy of the Licensing Acts is concisely put by Lord Herschell, when arguing the case of *Graff v. Evans* (*ubi sup.*), and he there, in summing his case up: "It is clear, therefore, that sect. 3 of the Act of 1877 is aimed at

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sales in places of public resort.” The whole of that argument I now put forward in this case, and I use it for this purpose : I do not care whether this is a members club or a proprietary club. The footing on which the appellant stands is this : he became a member of a club ; he paid two guineas, and was elected a member, and it must be taken for the purposes of this case that he was properly elected. And what does he pay his two guineas for ? In order that he may use the property of the proprietor in common with the other members of the club. And the property of the proprietor comprises two things : the furniture in the house and the commodities which are consumed in the club. That the use of those commodities may take place without any sale or profit is clear. The proprietor may obtain no profit, and the advantage which a person gets for his subscription is that it gives to him a proportionate interest in the use of the furniture and in the use of the food and liquors consumed upon the premises. There is no fact found that there was a sale for profit. It is found that there are wines probably in bulk upon the premises of the club in the same way as in all members’ clubs, and in just the same way as they might be in all clubs. This attack must apply to all political clubs throughout the country conducted on the same principle of some person being put in who undertakes to find the things required for the club. Members pay their subscription, and for that they obtain the advantage of using the club and using the commodities in that club, subject to the rules of the club. The proprietors of the club here are an incorporated company ; they acquire the building and they furnish and stock it, and admit members at a certain rate and these members have a right to draw upon the commodities of the club at a scale of charges which may be laid down by the committee of management. It is possible that with the proprietors there should be a limit placed upon the tariff on which the goods should be supplied. It is true that it is found here that the goods, the liquors, the furniture, and the banking account all belonged to the company, but it was upon these terms that the members should have the right to draw upon the commodities in the club. It is said that there is a sale of the spirits to every member of the club, and a sale by the company. In *Graff v. Evans (ubi sup.)* the company or proprietor took his share of the joint stock ; here it is practically the same, the only difference being that he draws out from this stock, which is placed there for the benefit of the members, on a tariff limited by a committee, so that the person who takes his liquor in that club takes it on a plan of payment arranged, not by him with the proprietor, but arranged for him by the persons acting as trustees of the club, the committee ; the consideration for the payment by the members is really that the proprietor will keep the club going with the ordinary advantages of a club. It is a contract on the part of the proprietor that he will keep the house stored with all the requisites of a club. That being the contract, two guineas represents the consideration paid

for it, and in consideration of that sum the proprietor must keep the stock upon the premises. When we speak of carrying on a business for the sale of liquors by retail, we mean that they are sold for the purposes of profit. Here there may be no profit, as the proprietors might be content with the subscriptions, and that the members should receive articles at cost price. If so, this could not be called a carrying on of the business of selling wines, beer, and spirits by retail within the licensing laws. Again, clubs have been looked upon as peculiar institutions, and not within the ordinary law, so that there is no provision for serving writs upon clubs. You can only deal with individual members of clubs. The case of *Lyttelton v. Blackburne* (33 L. T. Rep. N. S. 641; 45 L. J. 219, Ch.) succinctly defines what is a club. You have a proprietor who takes the subscriptions, and the taking the subscriptions imposes upon him the obligation of supplying what is necessary, and for the subscriptions he exempts all members from liability in connection with the club and provides all necessities. A proprietary club is in substance the same as an ordinary club. In a members' club you have the members subscribing; they have a committee, who become responsible, and they are the persons to be proceeded against. Now, suppose the members say, "We want to have all the advantages of a club, to pay our subscriptions and be free from liability; let us get a common proprietor, who will furnish everything we require, take our subscriptions, and exempt us from liability." The result is precisely the same, whether the proprietor be an individual or a corporate body, as here. So that there practically is for all purposes no difference between a proprietary club and a members' club. I do not suggest that the case of *Graff v. Evans* (*ubi sup.*) governs this case. It was a bare question of fact in that case, and the finding of fact there was that it was not a *bonâ fide* club at all; and, although that is a good decision on the facts stated, it is open to us to go a step further and contend that, where the property is in one individual and the use in another, that is not a case contemplated by the Licensing Acts. Again, if a licence were necessary here, what would be the form of the licence? The licence is granted only to houses in which a retail business is carried on: (*Reg. v. Wilkinson*, 10 L. T. Rep. N. S. 370.)

Poland, Q.C. in reply.

MATHEW, J.—I think the findings of fact in this case should have led the magistrate to a different conclusion to that at which he arrived. It appears to me to be clear that, under the Acts referred to in the case, a licence to sell by retail was necessary to anybody who sold by retail, and the sole question before the learned magistrate was whether the proprietors of this club, a limited company, did sell by retail. We are dealing with this case, and with this case only, and the constitution of this so-called club was that the members, upon payment of certain subscriptions become entitled to the use of this house, and to the accommodation which the house afforded, and was further entitled to enter into

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contracts for the purchase of wines and spirits with the proprietors out of their stock. It is agreed on all hands that the stock of wines and spirits in this place belonged to the proprietors. It is agreed further that they were under no obligation to furnish to members of the club any special wine or any particular spirits. They supplied them as they thought proper, out of their own stock, and I am wholly unable to see any distinction in principle between this and the case of a friendly society arranging with the landlord of a public house that they shall have the use of a room on certain occasions, and be supplied by him with liquors. In that case a licence would be necessary, and this case seems to me to be so closely analogous that the same course would follow. We must, therefore, send the case back to the learned magistrate, with an intimation of our opinion.

WRIGHT, J.—I am of the same opinion. Mr. Crump's argument is divided into two points. His first point was that the restriction upon the sale of liquor applies to places of public resort. I do not think that is so. The intention may be that only houses of public resort shall be licensed by the joint action of the justices and the excise, but it does not follow that persons not keeping houses of public resort can sell without a licence. The other point was that in some proprietary clubs, and presumably in this one, although the proprietor sells to the members he is acting under a convenient arrangement by which the financial matters are conducted by him, and therefore it is not a sale. I cannot follow that. We ought not to be understood as laying down any rule applying to proprietary clubs generally. Upon these facts it appears clear there was a sale, and there is nothing to take it out of the Act.

Appeal allowed, without costs. Case to be remitted to the learned magistrate.

Solicitor for the appellant, *The Solicitor of Inland Revenue.*
Solicitor for the respondents, *Ralph Raphael.*

QUEEN'S BENCH DIVISION.

Monday, June 26, 1898.

(Before DAY and WRIGHT, JJ.)

WYATT (app.) v. GEMS (resp.). (a)

Nuisance—Projections from buildings—Metropolis—Articles in front of shop—Projection and obstruction—Liability to penalty in respect of articles so hung out—Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.), s. 65—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 119.

Sect. 65 of Michael Angelo Taylor's Act enacts that if any person (within the metropolis) shall hang out or expose any meat or offal or other matter or thing from any house belonging to or occupied by him over any part of the pavements or over any area or areas of any houses or other buildings, and shall not remove the same when required to do so, he shall be liable to a penalty of forty shillings.

Sect. 119 of the Metropolis Management Act, 1855, provides that if any projection or obstruction placed against any house or building shall be an annoyance in consequence of the same projecting into or rendering less commodious the passage along any street, then the owner or occupier, on refusing to remove the same, shall be liable to a penalty of five pounds.

Held, that sect. 119 of the later Act does not repeal the provisions of sect. 65 of Michael Angelo Taylor's Act as to hanging articles out in front of houses, which provisions are still in force.

Held also, that the offence is committed under sect. 65 of the earlier Act by hanging articles out in front of a house, whether such articles are hung out over highways or not.

CASE stated by the metropolitan police magistrate sitting at the Marylebone Police-court.

An information was laid, under sect. 65 of the statute 57 Geo. 3, c. xxix. (Michael Angelo Taylor's Act), against the respondent, for that he did, on the 9th day of February, 1898, at 76, Wigmore-street, in the parish of St. Marylebone, hang out and expose, and cause and permit to be hung out and exposed, certain things, to wit, a large number of basket-work articles from a certain house, which said house was then occupied by him, over the area of the said house, and did not immediately remove all the said basket-work articles upon being thereupon

(a) Reported by W. W. OBE, Esq., Barrister-at-Law.

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required by the appellant, then being a person employed by the vestry of St. Marylebone, which said vestry had the control of the pavements aforesaid.

A second information was also laid against the respondent, under the 24th section of the local Act 3 Geo. 4, c. lxxxiv., for that he did, on the above date, at 76, Wigmore-street aforesaid, hang up and expose to sale, and cause and permit to be hung up and exposed to sale, certain goods, to wit, a number of basket-work articles, on the outside of the windows of a certain house and shop, to wit, No. 76, Wigmore-street, in the parish of St. Marylebone, at which house and shop the said articles were then hung up and exposed to sale.

There were two similar informations with regard to the house No. 78, Wigmore-street, and the four summonses were heard together.

The respondent is the occupier of certain shops and premises, Nos. 76 and 78, Wigmore-street, and carries on there the business of a basket manufacturer, and is in the habit of displaying for sale part of his stock, consisting of basket-work chairs, stands, and couches, in front of the above premises, the basket chairs and other articles being all above the shop front and projecting some two and a half feet from the front walls of the two shops in the respondent's occupation; the said articles hanging from strong iron holdfasts driven into the walls.

The appellant is the district superintendent for the vestry of the parish, and pursuant to the powers conferred on them by the Acts 57 Geo. 3, c. xxix., s. 65, and 3 Geo. 4, c. lxxxiv., s. 24, gave the respondent notice, in pursuance of a resolution of the vestry, to remove and keep removed the basket chairs and other articles from the front of the above premises.

The respondent, not having complied with the said notice, was, on the application of the appellant acting on behalf of the vestry, summoned before the magistrate, and upon the hearing of the summonses the above facts were either proved or admitted.

It was contended on behalf of the appellant :

1. That under the 65th section of the Act 57 Geo. 3, c. xxix., which enacts that,

If any person shall hang out and expose, or cause or permit to be hung out or exposed, any matter or thing whatsoever from any house or houses or other buildings or premises occupied by him, her, or them over any part of either of the pavements or over any area or areas of any houses or other buildings or premises or shall place or put out, or cause or permit to be placed or put out any matter or thing from and on the outside of the front or any other part of any house or houses or other buildings or premises, and shall not immediately remove all such matters or things being thereunto required by any surveyor of pavements, or by any person employed or appointed by the persons having the control of the pavements in any parochial or other district, such person so offending shall forfeit and pay the sum of forty shillings for the first offence,

the respondent had committed the offence charged against him on two of the said summonses issued under the provisions of the said statute (57 Geo. 3, c. xxix.).

2. That under the 24th section of the Act (3 Geo. 4, c. lxxxiv.),

If any person hangs up or exposes to sale, or causes or permits to be hanged up or exposed to sale any goods, wares, or merchandise whatsoever, or other matter or thing beyond the line or on the outside of the window or windows of the house, shop, or place at which the same shall be so hanged up or exposed to sale, then and in every such case every person so offending shall pay any sum not exceeding five pounds and not less than ten shillings,

the respondent had committed the offences charged against him in the said two summonses issued under the said statute, 3 Geo. 4, c. lxxxiv.

3. That the above provisions in these two Acts were not inconsistent with the provisions in sects. 119 and 120 of the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), within the meaning of sect. 248 of that Act, and were therefore not repealed by that Act. It was contended on behalf of the respondent that the said statutes, 57 Geo. 3, c. xxix., and 3 Geo. 4, c. lxxxiv., had been repealed as to the present point by the said Metropolis Local Management Act, 1855, and that the baskets were neither a danger nor obstruction, and that therefore no offence had been committed by the respondent, as charged in any of the four summonses.

The magistrate was of opinion that the respondent was right, and that the sections of the two earlier statutes under which the summonses had been issued had been impliedly repealed by the Metropolis Local Management Act (18 & 19 Vict. c. 120), the words in which Act covered every kind of projection; and independently of such implied repeal, there had not been any offence committed under the said earlier Acts, as the articles mentioned in the said summonses did not extend over the footway or carriage-way, and were no inconvenience to the public walking on the pavements of Wigmore-street. He therefore dismissed the summonses, with 5*l.* 5*s.* costs.

The question for the opinion of the court was, whether his said determination was right in point of law.

The Metropolis Management Act, 1855 (18 & 19 Vict. c. 120) provides :

Sect. 119. If any porch, shed, projecting window, step, cellar door or window, or steps leading into any cellar or otherwise, lamp, lamp post, lamp iron, sign, sign post, sign iron, showboard, window shutter, wall, gate, fence or opening or any other projection or obstruction placed or made against or in front of any house or building after the commencement of this Act, shall be an annoyance, in consequence of the same projecting into, or being made in, or endangering or rendering less commodious the passage along any street in their passage or district, it shall be lawful for the vestry or district board to give notice in writing to the owner or occupier of such house or building to remove such projection or obstruction, or to alter the same in such manner as the vestry or board think fit; and such owner or occupier shall within fourteen days after the service of such notice upon him, remove such projection or obstruction, or alter the same in the manner directed by the vestry or board; and if the owner or occupier of any such house or building neglect or refuse, within fourteen days after such notice, to remove such projection or obstruction, or to alter the same in the manner directed by the vestry or the board, he shall forfeit any sum not exceeding five pounds, and a further sum not exceeding forty shillings for every day during which such projection or obstruction continues, after the expiration of such fourteen days from the time when he may be convicted of any offence contrary to the provisions hereof.

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Under sect. 120, the vestry or district board may remove obstructions or projections which are an annoyance as aforesaid.

Poland, Q.C. and *Bodkin* for the appellant.—The magistrate held here that there was an implied repeal of the provisions of the earlier Acts, by the 119th section of the later Act. We submit the magistrate was wrong upon that point. The case is important because it is contended for the respondent, that not only sect. 65 of Michael Angelo Taylor's Act is repealed, but also sect. 24 of the local Act, 3 Geo. 4, c. lxxxiv., and it is said that sect. 119 of the Metropolis Management Act, 1855, is the section which repeals them. We submit that Michael Angelo Taylor's Act is expressly declared to apply to a case of this kind, whereas sect. 119 of the Act of 1855 relates only to permanent structural projections, and has no application here. There can, therefore, be no repeal. [They were stopped.]

Crump, Q.C. (*Rose-Innes* with him) for the respondent.—Here, according to the finding of the magistrate in the case, the articles did not overhang the footway or carriageway, and were no inconvenience to the public walking in the street. There was no question of a projection of a structural character, but it was simply a case of a person who suspends in front of his house baskets and other articles he sells, and suspends them not as articles of sale, but as samples, the articles being hung on nails fixed in the wall. Michael Angelo Taylor's Act and other Acts in force in the metropolis are all aimed at and intended to apply to freedom of obstruction of the footways. Here, however, the respondent is hanging out something in front of his own house which is over his own land, a thing which was never aimed at by the section in Michael Angelo Taylor's Act, which was intended to prevent projections being put over the public way or the carriageway. And the magistrate, by his finding, has in effect found that there was no offence under the earlier Act. No one can suggest that these baskets did in any way obstruct or hang over any part of the public thoroughfare. They hung over a portion of an area which belonged to the respondent himself, and no portion of any of the baskets or chairs projected over a public footway or carriageway. Referring to sect. 65 of Michael Angelo Taylor's Act, when the section speaks of things hung out over any "area," the area there contemplated is an area which is a part of the public footway, an area where the public have a right to go. Here the area is no part of the public footway, and on looking at the section—sect. 65—the words used are "in," "upon," or "over" any carriageway or footway. These words are twice used, and the section says, "shall hang out or expose, &c." These words are governed by the previous words "in," "on," "or over." There is no question here as to placing things "in" the footway, so that everything referred to in the section must be either "upon" the footway or "over" the footway, which does not include the present case, and there is nothing in the section referring to

things hanging over a space which is not a part of the footway, as here over an area of a house. [DAY, J.—It is putting a thing outside a house.] The next point is, that sect. 119 of the Act of 1855 does in effect repeal the sections of the two earlier Acts, so far as the present question is concerned. It is impossible to say that sect. 65 of Michael Angelo Taylor's Act and sect. 119 of the Act of 1855 are both still in force. We see instances where the very same words are used in the two sections, which would show that the Legislature intended that the later section should supersede the earlier. For example, sect. 119 of the Act of 1855 uses the word "showboard" and sect. 65 of the earlier Act uses the same word, "showboard," and if the two sections are still in force, a person might be prosecuted and convicted under the earlier Act and then prosecuted under the later Act and subjected to a heavier penalty than before. The two sections lay down different penalties or punishments, the penalty under the earlier section being forty shillings, and the penalty under the later section being five pounds, and where there are inconsistent punishments for the same offence, one or other statute must go, and, of course, it must be the earlier one. My whole contention here is, that, in dealing with the matters in sect. 119, the Legislature sets out all the possible offences that can be committed, thereby dealing with the whole matter. We have, then, in the two sections the offences the same, but the punishments different, and these conditions bring the case within the authorities which lay down that where there are two Acts dealing with the same subject-matter, and the punishments different, the earlier Act cannot stand. The cases of *Summers v. Holborn District Board of Works* (68 L. T. Rep. N. S. 226; (1893) 1 Q. B. 612) and *Fortescue v. The Vestry of St. Matthew, Bethnal Green* (65 L. T. Rep. N. S. 256; (1891) 2 Q. B. 170) are much stronger decisions than this case would be.

Poland, Q.C. in reply, was stopped.

DAY, J.—I have no doubt about this case. In my judgment Michael Angelo Taylor's Act, sect. 65, is not repealed as to this matter; certainly not expressly, and, in my judgment, not by implication, and the case does not come within the principle explained by Cave, J. in the case of *Summers v. The Holborn District Board* (*ubi sup.*). There is no analogy between the two classes of cases. This is a specific offence in Michael Angelo Taylor's Act, which is not dealt with in any way under the Metropolis Management Act, so there is no ground whatever for the suggestion that the later Act repeals these provisions in sect. 65, so far as they are applicable to this particular offence, which have no bearing upon other portions of that long section. The provisions of that portion of the section, under which this conviction has been sought, are in no way repealed by anything that is to be found in 18 & 19 Vict. c. 120. With reference to the other finding of the magistrate, the provision of the earlier Act, in my opinion, does not relate to a danger to highways at

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Nuisance—
Projections
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ings—Articles
hung in front
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Michael
Angelo
Taylor's Act,
57 Geo. 3,
c. 55; ;
Metropolis
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Act, 1855,
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c. 120, s. 119.

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1898.

Nuisance—
Projections
from build-
ings—Articles
hung in front
of shop—
Michael
Angelo
Taylor's Act,
57 Geo. 3,
c. xxix.;
Metropolis
Management
Act, 1855,
18 & 19 Vict.
c. 120, s. 119.

all. It relates to things hung out, it does not matter whether over highways or not over highways. Any unsightly thing that is hung outside the house, which a person is called upon to remove by the local authority, is within the mischief of the Act. That is clear by the use of the word "area," if for no other reason.

WRIGHT, J.—I am of the same opinion. I think it is clear that the judges who decided *Summers v. The Holborn District Board* (*ubi sup.*) did not think that there was anything like a general repeal of the provisions of Michael Angelo Taylor's Act by the provisions of the Metropolis Management Act; otherwise they would not have been driven to make the observations which they did upon the particular inconsistency in the case of costermongers who were authorised, subject to regulations, by the latter Act, to do things which they would have been prohibited from doing under the former Act. Thus there was a necessary inconsistency upon that particular point. On the other hand, I do not think that the respondent would commit an offence against the second of the two Acts, unless he hung out or exhibited for sale; he would not commit an offence against that provision merely by hanging out specimens; but I think he does come within the provision about hanging out matters or things "over any part of either of such pavements or over any area or areas of any houses or other buildings." I see nothing in this provision inconsistent with the Metropolis Management Act of 1855.

Appeal allowed with costs. Case remitted to the magistrate to be proceeded with.

Solicitors for the appellant, *Clarkson, Greenwells, and Co.*
Solicitors for the respondent, *Stollard and Swan.*

QUEEN'S BENCH DIVISION.

Monday, May 15, 1893.

(Before POLLOCK, B. and KENNEDY, J.)

ROSE (app.) v. FROGLEY (resp.) (a)

*Licensing Acts—Death of licence-holder—Minority of heir —
35 & 36 Vict. c. 94, s. 3.**It is not necessary that the heir of a licensed person who dies before the expiration of his licence should have attained the age of twenty-one years before he can sell intoxicating liquors and carry on the business of the licensed house until the next special sessions without incurring the penalties imposed by sect. 3 of the Licensing Act, 1872.***T**HIS was a special case stated by magistrates.

The appellant, a young man of between twenty and twenty-one years of age, was the son of a widow who held a licence in respect of a certain beerhouse in Hertfordshire. On the 20th day of October, 1892, during the currency of the licence, she died, and the next special sessions being fixed for the 4th day of January, 1893, the appellant, whom the magistrates found to be her heir, carried on the business. On the 7th day of December he sold beer to the respondent, a police inspector, by whom a complaint was laid against him for selling intoxicating liquor, he being an unlicensed person, and he was convicted and fined 6*d.*, the ground of the conviction being that the immunity provided by the last part of sect. 3 of the Licensing Act, 1872, did not apply to an heir under the age of twenty-one years.

Sect. 3 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), after prescribing penalties for persons selling or exposing for sale intoxicating liquors without being duly licensed to do so, concludes with the following proviso:

No penalty shall be incurred under this section by the heirs, executors, administrators, or assigns of any licensed person who dies before the expiration of his licence, or by the trustee of any licensed person who is adjudged a bankrupt or whose affairs are liquidated by arrangement before the expiration of his licence, in respect of the sale or exposure for sale of any intoxicating liquor, so that such sale or exposure for sale be made on the premises specified in such licence, and take place prior to the special session then next ensuing, or (if such special session be holden within fourteen days next after the death of the said person, or the appointment of a trustee in the case of his bankruptcy or the liquidation of his affairs by arrangement) take place prior to the special session holden next after such special session as last aforesaid.

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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*Licensing
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of licence-
holder—
Minority of
heir—35 & 36
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s. 3.*

R. D. Muir for the appellant.—The magistrates find as a fact that the appellant was the heir of the deceased licence-holder, all the conditions of the section were complied with, and he was entitled to sell intoxicating liquors without being liable to a penalty, till the special sessions were held on the 4th day of January, 1893. There is nothing in the Act to say that a licence-holder must be of full age, and an executor certainly need not be so. The object of the provision is to bridge over the interval which must happen on the death of a licence-holder before any application whatever can be made, and to give the family of the deceased time to transfer their interest to the best advantage. In the Beerhouse Act, 1840 (3 & 4 Vict. c. 61), s. 8, it is provided that on the death of a licensed person the executors or administrators, or the widow and child, may be authorised to sell for the remainder of the term. That enactment is for the same purpose as the present, and it contemplates a person of nonage holding a licence for three months. The widow, at any rate, might be under age, but that would not debar her. There is nothing in any of the statutes dealing with this matter to say that a person must be of full age before he can hold a licence to sell intoxicating liquors. The youth of an applicant may be taken into consideration by magistrates in exercising their discretion, but there is no inherent incapacity in a minor to carry on this particular trade. The only word in the section is "heir," and that the appellant has been found as a fact to be, and his conviction was therefore wrong.

The respondent was not represented.

POLLOCK, B.—Though at first sight there appears to be some difficulty in this case, I am of opinion that it may be solved by saying that when the word heir is used it is not restricted to persons over twenty-one years of age. In granting a licence the question of age is left to the discretion of the magistrates just as any other insufficiency or infirmity, and there is nothing to show that a person is to be considered as not of an age to carry on a licensed house respectably merely because he is under twenty-one.

KENNEDY, J. concurred.

Appeal allowed.

Solicitors for the appellant, *Godden, Son, and Holme*, for *Hodding*, St. Albans.

QUEEN'S BENCH DIVISION.

Wednesday, June 14, 1893.

(Before MATHEW and WRIGHT, JJ.)

MIDLAND RAILWAY COMPANY v. MARTIN AND CO. (a)

Detention of goods—Order for restitution—Recovery of goods in police-court under 2 & 3 Vict. c. 71, s. 40—Action for consequential damage in the County Court—Res judicata.

A person whose goods have been detained by a railway company, and who has obtained an order in the police-court under the Act for regulating the police-courts in the metropolis (2 & 3 Vict. c. 71, s. 40) for the delivery of the goods, is not by that order debarred from pursuing by means of an action in the County Court his further claim for damages for their detention.

THIS was an appeal on behalf of the defendants, from a decision of his Honour Judge Lushington in the County Court held at Croydon.

The action was brought by the plaintiffs for the cost of the carriage of certain goods; the defendants confessed the claim, and counter-claimed for special damages caused by the detention of the same goods.

The plaintiffs detained the goods on the ground that they had a general lien upon them, but prior to the bringing of this action the defendants had given the plaintiffs notice that they were suffering special damage by the detention, and had taken out a summons in the Edgware Police-court, under sect. 40 of the before-mentioned Police Act (2 & 3 Vict. c. 71).

The magistrates made an order that the goods should be given up to the defendants, and accordingly the goods were given up to them.

To the defendants' present claim for the damages consequential on the detention, the plaintiffs objected that the claim was barred by the order made in the police-court and that the matter was *res judicata*. The learned County Court judge upheld the objection, and thereupon this appeal was brought by the defendants.

By sect. 40 of 2 & 3 Vict. c. 71 (the Metropolitan Police Court Act) it is enacted:

That, upon complaint made to any of the said magistrates by any person claiming to be entitled to the property or possession of any goods which are detained by any other person within the limits of the metropolitan police district, the value of which

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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1893.

*Detention of
goods—Order
for restitution
—Action for
damages—
Res judicata
— 2 & 3 Vict.
c. 71, s. 40.*

shall not be greater than fifteen pounds, and not being deeds, instruments, or papers relating to any property of greater value than fifteen pounds, it shall be lawful for such magistrate to summon the person complained of, and to inquire into the title thereto, or to the possession thereof, and if it shall appear to the magistrate that such goods have been detained without just cause, after due notice of the claim made by the person complaining, or that the person detaining such goods has a lien or right to detain the same by way of security for the payment of money, or the performance of any act by the owner thereof, it shall be lawful for such magistrate to order the goods to be delivered to the owner thereof, either absolutely or upon tender of the amount appearing to be due by such owner (which amount the magistrate is hereby authorised to determine), or upon performance or upon tender and refusal of the performance of the act for the performance whereof such goods are detained as security. . . .

Colam for the defendants, appellants.—The subject-matter of the application to the magistrate was entirely different from that which forms the basis of this claim, and having recovered the goods by one remedy, there is nothing to prevent the defendant from employing another remedy to obtain the damages for the detention. The latter are entirely separate from the claim to the goods themselves, and could not be obtained in the summary proceedings :

Loehnis for the respondents.—The defendants had two courses open to them. They elected to follow the summary remedy, and waived their claim to damages :

MATHEW, J.—This appeal must be allowed. There is no ground for saying that this question was disposed of before the magistrates, and there is nothing in the Act of Parliament to require the defendants to elect between their remedy there and their remedy in the County Court. They go before the magistrates, and in accordance with their order the goods are handed over ; then they have an additional claim for damages in respect of the detention of the goods with which the magistrates have no power to deal. In my opinion the learned County Court judge was wrong in holding that that question was already disposed of, and there must be a new trial.

WRIGHT, J.—The justices had no power to deal with this claim of the defendants, and no doctrine of election has any application here. The remedy pursued before the justices was not for the same thing as the remedy in the County Court ; the former was only a summary remedy to obtain delivery of the goods, the latter was in respect of the damages for detention. The case of *Nelson and others v. Couch* (8 L. T. Rep. N. S. 577 ; 5 C. B. N. S. 99) involves the principle on which this case ought to be decided.

Appeal allowed. New trial ordered.

Solicitors for the plaintiffs, *Beale and Co.*

Solicitors for the defendants, *Ranger, Burton, and Co.*

OXFORD CIRCUIT.

STAFFORD WINTER ASSIZES.

Saturday, Dec. 16, 1893.

(Before CAVE, J.)

REG. v. MALE AND COOPER. (a)

Evidence—Admissibility of confession—Prisoner's answers to constable's questions—Statement of third party read to prisoner—Constable's duty on arrest.

On the arrest of a prisoner, a constable has no right to ask questions, and if the prisoner answers, the answers are not admissible in evidence against him.

If a third party make a statement which is taken down in writing, and read over by a constable to a prisoner, neither it nor the conversation induced by it are admissible in evidence, because it is an attempt by the constable to manufacture evidence, and that he has no right to do.

A constable has no right to charge a prisoner with an offence in respect of which he is not in possession of a warrant.

THE prisoners, Harriet Male and Mary Cooper, were indicted for performing an illegal operation on Esther Woodhouse.

Owen and Jesse Herbert for the prosecution.

Kettle for the prisoner Male.

Shakespeare for the prisoner Cooper.

Esther Woodhouse, who was the only witness called to speak to the facts, stated in cross-examination that an inspector of police had come to see her, and that on the inspector stating that she had better tell the truth, and that if she did not do so she would be prosecuted, she had made a statement which he took down in writing and she signed.

The police inspector proved the arrest of the prisoner Cooper under a warrant upon another similar charge. On her arrest, he cautioned her, and on the road to the station asked her questions, and informed her that Esther Woodhouse had made a statement, which, at her request, he read to her, and at the police station he charged her with this offence, for which no warrant had been taken out.

Shakespeare objected to the statement made by the prisoner to the inspector, on hearing Woodhouse's statement read, being given in evidence.

(a) Reported by EDWARD J. GIBBONS, Esq., Barrister-at-Law.

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constable—
Constable's
duty on arrest
of prisoner.

CAVE, J. allowed the objection, and said the police had no right to ask questions, or to seek to manufacture evidence, or to charge the prisoner with an offence for which they had no warrant. In summing up the case to the jury, he said: It is quite right for a police constable, or any other police officer, when he takes a person into custody to charge him, and let him know what it is he is taken up for, but the prisoner should be previously cautioned, because the very fact of charging induces a prisoner to make a statement, and he should have been informed that such statement may be used against him. The law does not allow the judge or the jury to put questions in open court to prisoners; and it would be monstrous if the law permitted a police officer to go, without anyone being present to see how the matter was conducted, and put a prisoner through an examination, and then produce the effects of that examination against him. Under these circumstances, a policeman should keep his mouth shut and his ears open. He is not bound to stop a prisoner in making a statement; his duty is to listen and report, but it is quite another matter that he should put questions to prisoners. A policeman is not to discourage a statement, and certainly not to encourage one. It is no business of a policeman to put questions, which may lead a prisoner to give answers on the spur of the moment, thinking perhaps he may get himself out of a difficulty by telling lies. I do not mean these remarks to apply only to this case; the jury must decide it on the evidence before them.

Verdict—Not guilty.

Solicitors: for the prosecution, *The Solicitor to the Treasury*; for the prisoner Male, *W. Clarke*, West Bromwich; for the prisoner Cooper, *W. Shakespeare and Sons*, Birmingham.

NOTE.—This decision resembles that in *Reg. v. Gavin* (15 Cox C.C. 656). It is important, as showing that the ruling of Smith, J. in that case, although disapproved of and not followed by Day, J. in *Reg. v. Backenbury* (*ante*, p. 628) was in accordance with the law applicable to the facts before him, though at the time it was heard (1885) it was supposed to lay down new law: [see the note to *Reg. v. Gavin*, 5 Cox C. C. 657, and compare the judgment of Cave, J. in *Reg. v. Thompson*, *ante*, p. 641; (1893) 3 Q. B. 12], in which that learned judge considered the authorities which establish the principle of law governing the admissibility of confessions, and stated the rule to be applied whenever it is sought to put in evidence statements made by prisoners as a guide in ascertaining whether or not such statements are admissible.

COURT OF APPEAL.

Wednesday, July 12, 1893.

(Before Lord ESHER, M.R., BOWEN, and KAY, L.JJ.)

RAWSON v. THE LONDON TRAMWAYS COMPANY. (a)

APPLICATION FOR A NEW TRIAL.

Tramway Company—Nonpayment of fare by passenger—Penalty—Summons before magistrate—Criminal offence—Tramways Act, 1870 (33 & 34 Vict. c. 78) ss. 51, 52, and 56.

By sect. 51 of the Tramways Act, 1870, if any person travelling or having travelled in any carriage on any tramway avoids or attempts to avoid payment of his fare, or if any person having paid his fare for a certain distance knowingly and wilfully proceeds in any such carriage beyond such distance, and does not pay the additional fare for the additional distance, or attempts to avoid payment thereof, or if any person knowingly and wilfully refuses or neglects, on arriving at the point to which he has paid his fare, to quit such carriage, he is liable to a penalty not exceeding forty shillings, which penalty, under sect. 56, may be recovered and enforced in the manner directed by the Summary Jurisdiction Act.

Held, that the acts forbidden by sect. 51 are criminal offences.

THIS was a motion by the defendants for judgment or a new trial. The action was for malicious prosecution in respect of proceedings taken by the defendants against the plaintiff under the Tramways Act, 1870.

By sect. 51 of the Tramways Act, 1870 (33 & 34 Vict. c. 78), it is provided as follows :

If any person travelling or having travelled in any carriage on any tramway avoids or attempts to avoid payment of his fare, or if any person having paid his fare for a certain distance knowingly and wilfully proceeds in any such carriage beyond such distance, and does not pay the additional fare for the additional distance, or attempts to avoid payment thereof, or if any person knowingly and wilfully refuses or neglects, on arriving at the point to which he has paid his fare, to quit such carriage, every such person shall for every such offence be liable to a penalty not exceeding forty shillings.

By sect 52 it is provided :

It shall be lawful for any officer or servant of the promoters or lessees of any tramway, and all persons called by him to his assistance, to seize and detain any person discovered either in or after committing or attempting to commit any such offence as in the next preceding section is mentioned, and whose name or residence is unknown to such officer or servant, until such person can be conveniently taken before a justice, or until he be otherwise discharged by due course of law.

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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By sect. 56 it is provided :

All tolls, penalties, and charges under this Act, or under any bye-laws made in pursuance of this Act, may be recovered and enforced as follows: in England before two justices of the peace, in manner directed by the Act of the session of the eleventh and twelfth years of the reign of Her present Majesty, c. 48, and any Act amending the same.

Practice—
Criminal
offence —
Penalty for
nonpayment
of tramway
fare—Tram-
ways Act,
1870, 83 & 84
Vict. c. 78,
ss. 51, 52,
and 56.

The defendants summoned the plaintiff at the West London Police-court, under sect. 51, for attempting to avoid payment of her fare and, having paid her fare for a certain distance and then proceeded beyond, attempting to avoid payment of her additional fare.

The magistrate dismissed the summons, and the plaintiff commenced the present action for malicious prosecution.

At the trial of the action, before Grantham, J., with a jury, the plaintiff obtained a verdict and judgment for 150*l*.

The defendants moved for judgment or a new trial.

Crump, Q.C. and *E. Hume Williams* for the defendants.—The first point is that, supposing that the defendants were acting maliciously and without reasonable and probable cause, nevertheless this action will not lie because there was no prosecution of the plaintiff by the defendants for a criminal offence. This section of the Tramways Act is not drawn up in the same way as the sections of the Railway Clauses Act, 1845 (8 Vict. c. 20), which refer to the punishment of persons travelling with the intent of defrauding a railway company of its fare. Here no mention is made of any fraudulent intent. A passenger may act quite honestly and yet come within the provisions of sect. 51. The object of the section is merely the enforcement of a civil right. The right, it is true, is enforced by a penalty, but that alone does not make the matters mentioned in the section a crime. The proceedings before the magistrate are not taken by the Crown, they are in the nature of civil proceedings. A penal action is not a criminal proceeding: (*Atcheson v. Everitt*, 1 Cowp. 382). The use of the word "offence" does not involve the forbidden acts being crimes. The distinction between a forbidden thing being a crime and not being a crime, is whether proceedings are taken for the benefit of the public generally, or for the benefit of a private individual: (*Mellor v. Denham*, 42 L. T. Rep. N. S. 493; 5 Q. B. Div. 467; *Reg. v. Whitchurch*, 45 L. T. Rep. N. S. 379; 7 Q. B. Div. 534). The offences created by sect. 51 are new ones, and the only consequence which the statute provides for a passenger who comes within the section is the liability to pay a sum of money as a penalty. [BOWEN, L.J.—The mere creation of a penalty does not prevent an offence which would otherwise be a misdemeanour from being so. *Reg. v. Tyler* (65 L. T. Rep. N. S. 662; (1891) 2 Q. B. 588).] That was a case upon sect. 47 of the Judicature Act, 1873, as to whether certain defaults by a joint-stock company were a criminal cause or matter upon which an appeal would be to the Court of Appeal. That case and other cases upon the Judicature Act, 1873, such as *Ex parte*

Woodhall (59 L. T. Rep. N. S. 841; 20 Q. B. Div. 832) and *Ex parte Schofield* (64 L. T. Rep. N. S. 780; (1891) 2 Q. B. 428) do not apply here at all. The Judicature Act deals with procedure alone: (*Attorney-General v. Bradlaugh*, 52 L. T. Rep. N. S. 589; 14 Q. B. Div. 667).

C. A. Russell, for the plaintiff, was not called upon.

Lord ESHER, M.R.—The first proposition suggested here by the defendants is this, that even if they acted maliciously and without reasonable and probable cause, yet no action for malicious prosecution is maintainable for what they have done. Now, if the proceedings which they took against the plaintiff were criminal proceedings, there is no doubt that, if they acted maliciously and without reasonable and probable cause, this action will lie. It is not necessary to determine the point whether an action would lie if the proceedings taken by the defendants had not been criminal, because I am clearly of opinion that the proceedings they took against the plaintiff were criminal, that is to say, in respect of a criminal offence. The Legislature has passed an exceedingly strict law in favour of tramway companies, and has provided that, if a passenger on a tramway avoids or attempts to avoid payment of his fare, or, having paid his fare for a certain distance, knowingly and wilfully proceeds beyond that distance and does not pay the additional fare, or tries to avoid paying it, he may at once be seized and detained by the servants of the company and any persons whom they may call to their assistance, until he can conveniently be taken before a justice. That is an exceedingly strong piece of legislation; but such is the law, and if a passenger conducts himself in that way he has committed an "offence." That part of the Act of Parliament in which sects. 51 and 52 occur is headed "Offences," and a passenger who does any of the things mentioned in sect. 51 commits an offence in respect of which he may be seized and treated in the manner set forth in sect. 52. The case comes admittedly within Jervis's Act, and a passenger who does something forbidden by the section is liable to be punished in the same manner directed by Jervis's Act. It is perfectly clear that this offence is a criminal offence. If a particular mode of punishment were not provided by the Act, the offence would be punishable as a misdemeanour. And it is a misdemeanour; and not less so because it is only punishable in the way provided by the Act. I am clearly of opinion that sect. 51 creates a criminal offence, and that therefore an action for malicious prosecution will lie here so far as that point is concerned.

BOWEN and KAY, L.JJ. concurred.

Application dismissed.

Solicitors for the plaintiff, *Ray and Miers*.

Solicitors for the defendants, *Wilkins, Blyth, Dutton, and Hartley*.

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Vict. c. 78,
ss. 51, 52,
and 56.

QUEEN'S BENCH DIVISION.

Thursday, June 1, 1893.

(Before DAY and LAWRENCE, JJ.)

JONES (app.) v. DAVIS (resp.). (a)

Adulteration of Food—Skimmed milk sold as condensed milk—Label on article—Disclosure of alteration—Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 6, 7, and 9.

By sect. 6 of the Food and Drugs Act, 1875, it is provided that, "No person shall sell to the prejudice of the purchaser any article of food, &c., which is not of the nature, substance, and quality of the article demanded," &c.

By sect. 7, "No person shall sell any compound article of food," &c., "which is not composed of ingredients in accordance with the demand of the purchaser," &c.

By sect. 9, "No person shall with the intent that the same may be sold in its altered state without notice, abstract from an article of food any part of it so as to affect injuriously its quality, substance, or nature, and no person shall sell any article so altered without making disclosure of the alteration under a penalty in each case," &c.

The respondent sold to the appellant a tin of skimmed milk, which purported to be, and was sold as marked upon a label upon the tin, "Condensed Milk." On another part of the label, in smaller print it stated that, "this tin contains skimmed milk."

As to whether there had been a sufficient disclosure within the meaning of sect. 9 of the Food and Drugs Act:

Held, that the label on the tin was a disclosure of the contents of the tin, and the appeal was dismissed.

THIS was a special case stated by the magistrates for the county of Glamorganshire.

The complaint was laid under sect. 9 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), by the inspector appointed under the Act by the Glamorgan County Council (hereinafter called the appellant), against the respondent, charging that the respondent had in his possession a certain article of food, called and known as condensed milk, from which milk, prior to condensation, a portion 93 per cent. of the butter fat had been abstracted, so as to affect injuriously its quality, and did unlawfully so altered, sell such article without making disclosure of such alteration, contrary to the form of the statute.

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

After hearing the parties and the evidence adduced by them, the magistrates dismissed the complaint with costs.

The appellant being dissatisfied with the determination of the magistrates as being erroneous in point of law, applied to the justices to state a case for the opinion of a Divisional Court of the High Court of Justice, and the justices thereupon stated the following case for the opinion of the High Court, in which the following are shortly the facts :

1. The appellant went to the shop of the respondent and asked his wife, who was serving in the shop, to supply him (the appellant) with a tin of condensed milk.

2. The respondent's wife thereupon delivered the said tin of condensed milk, for which he paid 4½d.

3. The appellant then told the respondent that he purchased the tin for analysis by the public analyst, and offered to divide the article into three parts, which the respondent declined.

4. The appellant thereupon marked and sealed the tin, and sent it so marked and sealed to the public analyst for the county.

5. At the time of the purchase the attention of the appellant was not called to any label on the tin. He saw the words "Condensed milk, Swiss dairy brand," in large letters.

6. The said tin was produced, and bore the label as follows : "Condensed milk, Swiss dairy brand," and in smaller type were the words, "Swiss dairy brand." This tin contains skimmed milk, prepared and preserved with the finest cane sugar. It will be found cheaper than ordinary fresh milk, and the best for all household purposes," &c.

7. The said tin, together with half the contents thereof, was received by the appellant from the public analyst, accompanied by his certificate of the result of the analysis, which was as follows : "But one hundred parts of the milk contained in the above sample consisted of seven parts genuine whole milk and ninety-three skimmed milk ; in other words, the above sample was deficient in butter to the extent of at least 93 per cent."

The justices were of opinion that the label annexed to the article sold contained a sufficient disclosure of the alteration within the meaning of the 9th section of the Food and Drugs Act, 1875.

The questions of law arising upon the above statement of facts are : (1) Whether a disclosure on a label, such as is proved to have been given in this case would, without specially calling the purchaser's attention thereto, be a sufficient discharge under sect. 9 of the Sale of Food and Drugs Act, 1875. (2) Whether under the circumstances above set forth, the said label contains a sufficient disclosure of the alterations proved.

Sect. 9 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63) provides as follows :

No person shall with the intent that the same may be sold in its altered state, without notice abstract from any article of food any part of it so as to affect

JOHNS
v.
DAVIS.
1893.

*Adulteration
of food—
Skimmed milk
—Abstraction
of fat—
Disclosure of
alteration by
label—
38 & 39 Vict.
c. 63, ss. 6, 7,
and 9.*

JONES
v.
DAVIS.

1898.

*Adulteration
of food—
Skimmed milk
—Abstraction
of fat—
Disclosure of
alteration by
label—
38 & 39 Vict.
c. 68, ss. 6, 7,
and 9.*

injuriously its quality, substance, or nature, and no person shall sell any article so altered without making disclosure of the alteration under a penalty in each case, &c.

Paul Allen for the appellant.—The article of food sold here was milk. There was nothing to show a purchaser of the article that it was anything else than ordinary milk, unless he looked at the other side of the tin at the other end of the label, where he would read that it was “skimmed milk.” I contend that this was not a good and sufficient disclosure of what the article was under the 9th section of the Food and Drugs Act, 1875. I contend that the purchaser was bound to have his attention called to the fact that he was buying skimmed milk; his attention was called on the face of the label to the fact that he was buying condensed milk. I agree that it would have been all right if the respondent had put on the label, “Condensed skimmed milk.” The words of the section are that no person shall sell any article which has been altered “without making disclosure of the alteration.” I contend that there was not sufficient disclosure in this case.

Grain, for the respondent, was not called upon.

DAY, J.—It is quite clear to us that this appeal must be dismissed. The magistrates in this case have acted with very great discretion in refusing to convict the respondent. The respondent was charged with having sold what he purported to sell, namely, skimmed milk, which was what he said he was selling. We hold that the label upon this tin of condensed milk was a disclosure of the contents of the tin, and this appeal must therefore be dismissed with costs.

LAWRANCE, J. concurred.

Appeal dismissed with costs.

Solicitors for the appellant, *Ilife, Russell, and Co.*, agents for *W. E. R. Allen*, Cardiff, South Wales.

Solicitors for the respondent, *Bell, Brodrick, and Gray*, agents for *Linton and C.* and *W. Kenshole*, Aberdare, South Wales.

COURT OF APPEAL.

Tuesday, Nov. 14, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)

CHUDLEY v. CHUDLEY. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Husband and wife—Temporary separation for mutual convenience
—Refusal on part of husband to take back or maintain his wife
—Desertion—Married Women (Maintenance in case of Desertion)
Act, 1886 (49 & 50 Vict. c. 52), s. 1, sub-sect. 1.*

During a temporary separation between a husband and wife for mutual convenience cohabitation does not cease and the marital relations are not altered. And the husband, who under such circumstances refuses to take his wife back again or to maintain her, may be guilty of desertion within the meaning of the Married Women (Maintenance in case of Desertion) Act, 1886, and liable thereunder.

Reg. v. Leresche (ante, p. 384; 65 L. T. Rep. N. S. 602; (1891) 2 Q. B. 418) distinguished.

Decision of the Divisional Court (Day and Lawrance, JJ.), 69 L. T. Rep. N. S. 348, affirmed.

A SPECIAL case was stated for the opinion of the Divisional Court by certain Devonshire justices, who, subject thereto, had made an order on John T. Chudleigh, under the Married Women (Maintenance in case of Desertion) Act, 1886, to contribute the sum of 7s. 6d. per week towards the maintenance and support of his wife Emily Jane Chudley, whom he had deserted.

The parties were married at Exmouth, in Devonshire, in 1884, and afterwards lived together at Ilfracombe in that county. In April, 1889, the husband, who was a waiter, obtained employment at Fowey, in Cornwall, where in June of the same year he was joined by his wife and family. They lived there together till the 12th day of Sept., 1889, when the wife, being *enceinte*, went to her mother's house at Exmouth to be confined, and was there delivered of a child. For a time the husband remitted small sums of money to her, but, after March, 1890, the payments entirely ceased. His wife wrote to him, and ultimately saw him at Torquay, whither he had in the meanwhile removed, but he refused to let her live with him or to contribute to her maintenance in any way.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

CHUDLEY
v.
CHUDLEY.

1893.

*Husband and
wife—Deser-
tion—Separa-
tion for
mutual con-
venience—
Refusal to
take back wife
and maintain
wife—49 & 50
Vict. c. 52,
s. 1 (1).*

It was decided by the Divisional Court (Day and Lawrance, JJ.) that upon these facts the magistrates were quite right in making the order; that the separation on the wife's departure for Exmouth being only a temporary one for the mutual convenience of both husband and wife, cohabitation had not ceased; that nothing had taken place to alter the marital relations; that therefore the husband's conduct amounted to desertion; and that, as the wife was within the jurisdiction of the Devonshire magistrates, destitute, and without means, they had jurisdiction to entertain her application, though the desertion took place in Cornwall.

Upon the question of desertion the husband now appealed.

Bucknill, Q.C. (*Footo* with him), for the appellant, contended that, inasmuch as the wife was living at Exmouth, away from her husband, when the refusal to maintain her occurred, the parties were not living together, and no desertion within the meaning of sect. 1 of the Married Women (Maintenance in case of Desertion) Act 1886 was possible; that unless the parties were actually cohabiting the husband could not be charged with desertion; and that during a separation, though temporary and by mutual consent, and for mutual convenience, desertion could not take place. He relied upon *Fitzgerald v Fitzgerald* (19 L. T. Rep. N. S. 575; L. Rep. 1 P. & D. 694); *Pape v. Pape* (20 Q. B. Div. 76); *Reg. v. Leresche* (*ante*, p. 384; 65 L. T. Rep. N. S. 602; (1891) 2 Q. B. 418).

Pitt-Lewis, Q.C. and *P. H. Pridham Wippell*, for the respondent, were not called upon to argue.

LINDLEY, L.J.—The question in this case is, whether the magistrates were right in declaring the husband liable to pay alimony to his wife. The Married Women (Maintenance in case of Desertion) Act, 1886, sect. 1, enacts as follows: "From and after the passing of this Act it shall be lawful for any married woman, who shall have been deserted by her husband, to summon her husband before any two justices in petty sessions, or any stipendiary magistrate, and thereupon such justices or magistrate, if satisfied that the husband, being able wholly or in part to maintain his wife, or his wife and family, has wilfully refused or neglected so to do, and has deserted his wife, may order that the husband shall pay to his wife such weekly sum not exceeding two pounds as the justices or magistrate may consider to be in accordance with his means, and with any means the wife may have for her support, and the support of her family, and the payment of any sum so ordered shall be enforceable and enforced against the husband in the same manner as the payment of money is enforced under an order of affiliation . . ." In order to give the magistrates jurisdiction to direct payment of maintenance to a wife who has been left by her husband, two things must be proved: First, desertion; and secondly, wilful refusal on the part of the husband to maintain his wife. As regards wilful refusal in the present case, the evidence of that is plain

enough. As regards desertion the facts of the case are simple. [His Lordship stated them, and continued:] We are asked to say in the face of those facts that the husband did not desert his wife. To say so would be to stultify the Act. Mr. Bucknill contends that there can be no desertion within the meaning of the Act unless the parties are living together as man and wife when the desertion takes place. And in support of that contention he relies on the case of *Reg. v. Leresche* (65 L. T. Rep. N. S. 602; (1881) 2 Q. B. 418). But the facts of that case were altogether different from the present, for there the husband and wife were living apart under a separation deed. His argument turns on a legal quibble. A husband and wife do not cease to live together, and cease to cohabit, merely because they are not in each other's society. If a wife goes temporarily on a visit away from her husband she does not cease to cohabit with him. To say that a husband and wife have ceased to cohabit because they do not at the time live together and occupy the same bedroom would be absurd. We should be acting contrary to common sense if we were to disturb the judgment of the Court below. The appeal must therefore be dismissed with costs.

SMITH, L.J.—The question which we have now to decide is whether Mr. Chudley had deserted his wife, and thus rendered himself liable to be ordered to pay for her maintenance under the Act of 1886. Authorities have been referred to in which it was held that there was no desertion where the parties were not actually living together as man and wife when the desertion took place. I ask myself whether in the present case the existing state of cohabitation came to an end when the husband and wife separated by reason of the wife's going to her mother's house at Exmouth to stay temporarily. [His Lordship stated the facts of the case, and continued:] I think it would be perfectly monstrous for us to say, in that state of facts, that the cohabitation between the husband and wife had ceased. In my judgment the facts of the case show that there was an existing cohabitation between the husband and wife down to the wife's visit to Exmouth. And I think that that state of cohabitation continued up to the time when the husband refused to take back his wife. I think that the appeal should be dismissed.

DAVEY, L.J.—I am of the same opinion, and I should not myself add anything to what has been already said were it not for the cases which have been cited in support of this appeal. I do not, however, think that any of those cases interfere with or place any real difficulty in the way of our decision in the present case. As regards the case of *Reg. v. Leresche* (*ubi sup.*), which was relied upon, Lopes, L.J., in delivering the judgment of the Court of Appeal, observed: "As was said in *Fitzgerald v. Fitzgerald* (19 L. T. Rep. N. S. 575; L. Rep. 1 P. & D. 694, 697), desertion implies an active withdrawal from a cohabitation that exists. This brings me to the case now before the court. The husband and wife, at the date of the alleged desertion, were living apart

CHUDLEY
v.
CHUDLEY.

1892.

Husband and
wife—Deser-
tion—Separa-
tion for
mutual con-
venience—
Refusal to
take back wife
and maintain
wife—49 & 50
Vict. c. 52,
s. 1 (1).

CHUDLEY
v.
CHUDLEY.
—
1893.
—
Husband and
wife—Deser-
tion—Separa-
tion for
mutual con-
venience—
Refusal to
take back wife
and maintain
wife—49 & 50
Vict. c. 52,
s. 1 (1).

under a separation deed. Cohabitation had ceased by mutual consent. It was therefore impossible that the husband could desert the wife. So far this case is governed by *Pape v. Pape* (20 Q. B. Div. 76).” I do not understand the judgment of Lopes, L.J. to mean that cohabitation ceases whenever a husband and wife are living apart, and under any circumstances. If we look at *Fitzgerald v. Fitzgerald* (*ubi sup.*), we find that no such proposition as that appears laid down there. In my opinion cohabitation in the present case did exist in law, notwithstanding the temporary separation that occurred when the wife went on a visit to her mother’s house at Exmouth. The husband refused to contribute to his wife’s maintenance, and refused to take her back to live with him. It is a clear case of desertion. We should stultify the Act if we did not, in these circumstances, decide that the husband had deserted his wife. The decision of the court below seems to me, therefore, quite right.

Appeal dismissed.

Solicitors for the appellant, *Robinson, Preston, and Stow*, agents for *Friend and Beal*, Exeter.

Solicitors for the respondent, *Mear and Fowler*, agents for *Petherick and Sons*, Exeter.

MIDLAND CIRCUIT.

WARWICK ASSIZES.

Dec. 12, 1893.

(Before CHARLES, J.)

REG. v. BOSTOCK. (a)

Assault—Indictment for unlawful and carnal knowledge of girl between thirteen and sixteen, and for indecent assault—Conviction for common assault.

Upon an indictment the first count of which charged the prisoner under sect. 5 of the Criminal Law Amendment Act, 1885, with unlawfully and carnally knowing a girl between the ages of

(a) Reported by J. P. MELLOR, Esq., Barrister-at-Law.

thirteen and sixteen years, and the same count of which charged him with an indecent assault upon the girl, Held, that the prisoner could be convicted of a common assault.

Rae.
v.
Bostock.
—
1898.

CHARLES BOSTOCK was tried upon an indictment the first count of which charged that he did, on the 5th day of October, 1893, at Warwick, unlawfully and carnally know Lucy Henrietta Lapworth, a girl above the age of thirteen years and under the age of sixteen years. A second count charged him with committing an indecent assault upon her.

Assault—
Indictment
for unlawful
and carnal
knowledge
and indecent
assault —
Conviction
for common
assault.

The facts proved showed that the girl was fourteen years of age, and was in domestic service in the house of the prisoner's mother. The prisoner in his statement admitted that he had on the occasion in question gone to the bedside of the girl, and had attempted to pull down the bedclothes, but that she had resisted, and he had then gone away.

The jury found the prisoner guilty of common assault.

J. J. Parfitt, for the prisoner, submitted that that amounted to a verdict of acquittal.

Pritchett, for the prosecution, referred to the case of *R. v. Guthrie* (L. Rep. 1 C. C. R. 241).

CHARLES, J.—The point is one of some difficulty. The prisoner is charged in this indictment for that he did unlawfully and carnally know Lucy Henrietta Lapworth, and a second count charges him with making an indecent assault upon her. The verdict of the jury has acquitted him of the offence charged in the first count, but has found him guilty of a common assault. The question is whether that verdict can be properly entered on the indictment as it stands. It is said that it can, and the case of *R. v. Guthrie* (L. Rep. 1 C. C. R. 241) is cited in support. That case is, however, not entirely analogous to the present one. In that case the prisoner was indicted under sect. 51 of 24 & 25 Vict. c. 100, which enacts that "whosoever shall unlawfully and carnally know and abuse any girl being above the age of ten years and under the age of twelve years shall be guilty of a misdemeanour," and which is in terms precisely the same as sect. 5 of the Criminal Law Amendment Act, 1885, with the exception of the alteration of the ages. On referring, however, to the indictment in *R. v. Guthrie* I find that it charged that "John Guthrie, on the 24th day of December, 1869, in and upon one Margaret Davidson, a girl above the age of ten years and under the age of twelve years, unlawfully did make an assault, and her the said Margaret Davidson did then unlawfully and carnally know." The Court for Crown Cases Reserved held that a verdict of common assault could be entered on that indictment, but they did so on the ground that in the indictment the substantive common law offence of an assault was charged as well as the statutory offence. The indictment in the present case begins with the charge that the prisoner "did unlawfully and carnally know," nothing being said about the assault. The two cases,

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v.
BOSTOCK.
 ———
 1898.
 ———
Assault—
Indictment
for unlawful
and carnal
knowledge
and indecent
assault—
Conviction
for common
assault.

therefore, are not identical. In the case of *R. v. Taylor* (L. Rep. 1 C. C. R. 194) the jury had found the prisoner guilty of a common assault on an indictment which charged him in the first count with unlawful wounding and in the second count with inflicting grievous bodily harm. The Court held that the verdict could be entered on the ground that the offences charged were misdemeanours, and that each of them necessarily included the lesser misdemeanour of an assault, although it was not alleged in express terms that an assault had been committed. In the present case the offence charged in the first count may or may not involve an assault. If the girl consented there would be no assault. If she did not consent there would be an assault. Considering that according to the prisoner's own statement whatever he did was done against the will of the girl, I should not hesitate to say that even on the first count the verdict of common assault could properly be entered. But any doubt that I might have felt is removed when I come to the second count. That charges in terms an indecent assault, and applying the principle of the two cases that I have cited I am clearly of opinion that on such a count a verdict of common assault can be lawfully returned. I therefore hold that the verdict can properly be entered on either count.

His Lordship then sentenced the prisoner to three months imprisonment with hard labour.

Solicitor for the prosecution, *W. B. Sanderson*, Warwick.

Solicitors for the defence, *G. Boddington* and *Bond*, Warwick.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Saturday, May, 13, 1893.

(Present : The Right Hons. the LORD CHANCELLOR (Herschell),
 Lords WATSON, and MORRIS, Sir RICHARD COUCH, and the Hon.
 G. DENMAN.)

Ex parte MACREA. (a)

PETITION FOR LEAVE TO APPEAL FROM THE HIGH COURT FOR THE
 NORTH-WEST PROVINCES, ALLAHABAD.

Practice—Leave to appeal in criminal cases—Misdirection.

Although in special and exceptional circumstances leave to appeal

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

may be granted in criminal cases, the Judicial Committee will not give leave to appeal merely on the ground of misdirection.

Ex parte
MACRAE.

1893.

THIS was a petition for special leave to appeal from a judgment of the High Court for the North-West Provinces of India, at Allahabad (Knox and Blair, JJ.), refusing leave to appeal from a conviction under sects. 420 and 511 of the Indian Penal Code, on the ground that the learned judge who tried the case had misdirected the jury.

Practice—
Appeal—
Privy Council
—Leave to
appeal in
criminal cases
—Misdirection.

The facts appear in the judgment of their Lordships.

Cowell and *Bodkin* appeared for the petitioner.

Their Lordships' judgment was delivered by,

The LORD CHANCELLOR (Herschell).—Their Lordships are of opinion that leave to appeal ought not to be granted in this case. The ground upon which leave is asked is that, the petitioner being indicted under sect. 511 of the Indian Penal Code, for an attempt to cheat, there was no evidence of an attempt to cheat, but only of preparation for such an attempt. Sect. 511 provides that "Whoever attempts to commit an offence punishable by this code with transportation or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence," shall be punished in the manner therein directed. The facts are, that the petitioner had obtained, with a fraudulent intent, as must be taken to the fact after the finding of the jury, letters of administration to be granted, which recited that a certain lost Government promissory note was the property of one Asad Ali, and further that he had with fraudulent intent, sent those letters to the Public Debt Office, as the foundation for an application for payment of the money. The learned judge who tried the case laid down in his charge to the jury, that in order to convict the prisoner they must be satisfied, not only that he intended to cheat, but that he had done an act towards that cheating, and the learned judge clearly had in view the distinction between preparation to commit an offence, and acts towards the commission of the offence. The jury found the petitioner guilty. Their Lordships see no reason to believe that there was any misdirection on the part of the learned judge, or that there has been a miscarriage of justice. But they do not desire to dispose of the petition simply upon that ground. If there be any foundation for this application it rests upon this—that the learned judge did not in his charge to the jury correctly construe sect. 511 of the Penal Code, or that he left the case to the jury when there was no evidence to go to them. In their Lordship's opinion, if they were to sanction an appeal in the present case, it would be very difficult to refuse leave to appeal in all cases in which it could be established that there had been a misdirection by the judge who tried the case. There are, no doubt, very special and exceptional circumstances in which leave to appeal is granted

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MACREA.

1893.

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criminal cases
—Misdirection.

in criminal cases; but it would be contrary to the practice of this board, and very mischievous, if any countenance were given to the view that an appeal would be allowed in every case in which it could be shown that the learned judge had misdirected the jury.

Solicitors for the petitioner, *Ranken, Ford, Ford, and Chester.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

July 17, 18, 20, 21, and Dec. 12, 1893.

(Present: The Right Hons. The LORD CHANCELLOR (Herschell), Lords WATSON, HALSBURY, ASHBOURNE, MACNAGHTEN, MORRIS, and SHAND.)

MAKIN AND WIFE v. ATTORNEY-GENERAL FOR NEW SOUTH WALES. (a)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Admissibility of evidence—Evidence of criminal acts other than those covered by the indictment—Criminal Law Amendment Act of New South Wales (46 Vict., No. 17) s. 423—"Substantial wrong or other miscarriage of justice."

Evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment is admissible in a criminal case if it be relevant to an issue before the jury, as bearing upon the question whether the act alleged in the indictment was designed or accidental, or to rebut a line of defence.

The appellants were indicted for the murder of an infant child whom they had taken in to nurse upon payment of a small sum, alleging that they desired to adopt it as their own.

Held (affirming the judgment of the court below), that evidence that several other infants had been received by the prisoners on like representations, and upon payment of sums inadequate to support them for more than a short time, and that bodies of infants had been found buried in the gardens of several houses occupied by the prisoners, was admissible.

Reg v. Geering (18 L. J. 215, M. O.) approved. Reg. v. Oddy (2 Den. 264; 20 L. J. 198, M. O.) distinguished.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

In a case where material evidence has been improperly admitted the New South Wales Criminal Law Amendment Act (46 Vict., No. 17), s. 423, which provides "that no conviction, or judgment thereon, shall be reversed, arrested, or avoided on any case stated, unless for some substantial wrong or other miscarriage of justice," does not empower the court to affirm a conviction if they are of opinion that there was sufficient evidence to support it independently of the evidence improperly admitted, unless such inadmissible evidence was directed to some merely formal matter.

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GENERAL FOR
NEW SOUTH
WALES.
1893.

Practice—
Evidence—
Admissibility
—Evidence of
criminal acts
other than
those charged
—Appeal
Privy Council
—Substantial
wrong or
miscarriage
of justice.

THIS was an appeal by special leave from a decision of the Supreme Court of New South Wales affirming a conviction of the two appellants for murder upon a case stated.

The case which the learned judge (Stephen, J.) submitted stated that the prisoners were indicted before him for the murder of Horace Amber Murray, a second count being added charging them with the murder of an infant whose name was unknown. He left the case to the jury upon the latter, and they returned a verdict of guilty. The child Murray was the illegitimate child of a domestic servant living at Redfern, who, in June, 1892, intrusted it to the Makins, whom she knew as Hill, paying with it a premium of 3*l*. The Makins were living at 109, George-street, Redfern, at the time the arrangement was made, but Murray was informed by the wife that they were about to remove to Hurstville. On the 29th day of June the Makins and their family, consisting of four daughters and a son, about two years old, removed to Burran-street, M'Donaldstown, and whether on that occasion they removed more than one child in addition to their own family it was impossible to say. At the inquest one of the daughters swore that six children were removed, but at the trial she swore that there were only five removed; and while the Makins resided in Burran-street some neighbours saw only one child in long clothes, which they understood to be a girl. On the 30th day of June the male prisoner called on Murray and told her that he had removed to Hurstville, and that her child was quite well, promising to bring it to her the following week. He promised also to send his address, which he did not do, and on Murray subsequently searching for Makin and his wife at Hurstville they could not be found. On the 5th day of July John Makin showed a child to a Mrs. King, who believed it to be Murray's, but could not swear to it. On the 9th day of Nov. some constables found the remains of four infants in the back yard of 109, George-street, among them being the body of a male child from two to nine weeks old; the gown and shirt buried with it being identified as those in which Murray's baby had been dressed. A minute portion of the infant's hair also resembled the hair of Murray's child. Previous to the finding of the four infants in George-street, Redfern, two bodies of infants had been discovered, one on the 11th and the other on the 12th day of October, on the premises in Burran-street, M'Donaldstown, where the Makins

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*Practice—
Evidence—
Admissibility
—Evidence of
criminal acts
other than
those charged
—Appeal
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wrong or
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had resided from the end of June until the middle of August. During the adjournment of an inquest on one of those bodies, Sarah Makin, the wife, came to her former residence in George-street, Redfern, and told a person residing there that she had called to see about those people who had lived there before her; that she was a great friend of theirs, and asked if the police had dug the yard up, and whether any bodies had been found in the yard. Both the prisoners were examined at that inquest, and they swore that the only child they had ever received to nurse was the one which they had in Burran-street, which was given to them after they arrived there. Sarah Makin swore that none but her own family were removed from George-street to Burran-street. On the 2nd day of November another body was found buried in Burran-street; and on the 3rd three additional bodies were discovered. On the latter date the prisoners were arrested; while in a cell John Makin told another person that seven bodies had been found, that there was another to be found, and when it was found he should never see daylight any more. He added that that was what a man got for obliging people, that he could do nothing outside as they were watching the ground too closely, that no doctor could prove that he ever gave the children anything, that he did not care for himself, but his children were innocent. On the 12th day of November the bones of two infants were found on premises in Levy-street, Chippendale, where the prisoners had resided. In May, 1892, Agnes Ward gave a child about three months old into the care of the Makins, paying with it a premium of 5*l*. John Makin told her that he was living in Kettle-street, but that he was going to North Shore or Balmain. She never saw the baby again, and when she met John Makin and asked for the child, he said that his wife was away, but that he would bring the child at any time she pleased to Dangar-place, Chippendale. He was, however, arrested two days subsequently. During the time that the Makins were residing in George-street and Burran-street no deaths were registered from their addresses. At the trial the prisoners made no statement, nor did they call any evidence. After his summing up the learned judge was asked to reserve certain points. These were, that the coroner was wrong in admitting evidence of the finding of other bodies than that of the child supposed to be Horace Amber Murray; that the coroner was also wrong in admitting the evidence of certain witnesses with regard to their transactions with the Makins; that there was no evidence to prove the identity of a body with that of Horace Amber Murray; and that there was no evidence of the death or cause of death of Horace Amber Murray, or that he was murdered. The prisoners' counsel had objected to the reception of any evidence as to other deaths, and to the evidence of certain witnesses who had given evidence before the coroner, and the learned judge told the jury that the Crown had failed in their endeavour to establish the identity of any of the bodies found with the children of the witnesses objected

to, and that they could not draw any inference as to their deaths from any such identification. He also told them that he should not regard the evidence as to the borrowing of a pick and shovel from a person named Hill. The questions which he left to the Superior Court were—whether the evidence objected to was admissible, and, if not, were the prisoners rightly convicted; and, even if inadmissible, was there evidence enough to sustain the conviction?

Fullarton, Q.C. and *Cunningham*, for the appellants, admitted that the child for the murder of which they were convicted was *Murray's* child, but urged that the evidence as to all the other cases was inadmissible. To admit that class of evidence would open the whole past life of the accused. There was a substantial miscarriage of justice within the meaning of the Colonial Criminal Law Amendment Act (46 Vict. No. 17), s. 423.

The authorities referred to are set out in the judgment.

Sir E. Clarke, Q.C., *Poland*, Q.C., *Chuer*, and *R. H. Long Innes*, for the respondent, argued that the evidence was admissible to negative the theory that the death was caused by accident. Apart from the evidence objected to there was evidence sufficient to support the conviction, and therefore the Court were right in affirming it under the provisions of the Colonial Statute (46 Vict. No. 17), s. 423.

Fullarton, Q.C. was heard in reply.

At the conclusion of the arguments the LORD CHANCELLOR said that their Lordships were of opinion that the evidence was admissible, and that they would give their reasons, and also their opinion on the construction of the statute, at a later date.

Dec. 12.—Their Lordships' reasons were stated by the LORD CHANCELLOR (*Herschell*) as follows:—The appellants in this case were tried and found guilty at the Sydney Gaol Delivery held at Darlinghurst, of the murder of the infant child of one *Amber Murray*. The learned judge before whom the case was tried deferred passing sentence until after the argument of the special case, which he stated for the opinion of the Supreme Court of New South Wales. The points reserved by the learned judge were: first, that his Honour was wrong in admitting evidence of the finding of other bodies than the body of the child alleged to be *Horace Amber Murray*; secondly, that his Honour was wrong in admitting the evidence of *Florence Risby*, *Mary Stacey*, *Agnes Todd*, *Agnes Ward*, and *Mrs. Sutherland*; thirdly, that there was no evidence to prove the identity of the body marked D. with that of *Horace Amber Murray*; fourthly, that there was no evidence of the death or cause of death of *Horace Amber Murray*, or that he was murdered. The questions for the Court were, whether the evidence objected to was admissible, and, if not, were the prisoners rightly convicted? and even if inadmissible, was there evidence sufficient to sustain the conviction? On the argument of the special case the third point

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was abandoned by the learned counsel for the prisoners. On the other points the judgment was in favour of the Crown. Special leave was granted to appeal to this Board from the judgment of the Supreme Court of New South Wales, some of the questions raised being of grave and general importance. At the close of the argument before their Lordships they intimated that they would advise Her Majesty that the appeal should be dismissed, and that they would state their reasons for this advice on a future occasion. There can be no doubt in their Lordships' opinion that there was ample evidence to go to the jury that the infant was murdered. Indeed, that point was scarcely contested in the argument of the learned counsel for the appellants. The question which their Lordships had to determine was the admissibility of the evidence relating to the finding of the other bodies and to the fact that other children had been intrusted to the appellants. In their Lordships' opinion the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other. The principles which their Lordships have indicated appear to be on the whole consistent with the current of authority bearing on the point, though it cannot be denied that the decisions have not always been completely in accord. The leading authority relied on by the Crown was the case of *Reg. v. Geering* (18 L. J. 215, M. C.) where on the trial of a prisoner for the murder of her husband by administering arsenic evidence was tendered, with the view of showing that two sons of the prisoner who had formed part of the same family, and for whom the prisoner had cooked food as well as for her husband, had died of poison, the symptoms in all these cases being the same. The evidence was admitted by Pollock, C.B., who tried the case; he held that it was admissible, inasmuch as its tendency was to prove that the death of the husband was occasioned by arsenic, and was relevant to the question whether such taking was accidental or not. The Chief Baron refused to reserve the point for the consideration of the judges, intimating that Alderson, B. and Tal-

fourd, J. concurred with him in his opinion. This authority has been followed in several subsequent cases. And in the case of *Reg. v. Dossett* (2 Carr. & Kir. 306), which was tried a few years previously, the same view was acted upon by Maule, J. on a trial for arson, where it appeared that a rick of wheat-straw was set on fire by the prisoner having fired a gun near to it. Evidence was admitted to show that the rick had been on fire the previous day, and that the prisoner was then close to it with a gun in his hand. Maule, J. said: "Although the evidence offered may be proof of another felony, that circumstance does not render it inadmissible, if the evidence be otherwise receivable. In many cases it is an important question whether a thing was done accidentally or wilfully." The only subsequent case to which their Lordships think it necessary to refer specifically is that of *Reg. v. Gray* (4 Fos. & Fin. 1102), where on a trial for arson with intent to defraud an insurance company, Willes, J. admitted evidence that the prisoner had made claims on two other insurance companies, in respect of fires which had occurred in two other houses which he had occupied previously and in succession, for the purpose of showing that the fire which formed the subject of the trial was the result of design and not of accident. The learned judge, after consulting Martin, B., refused to reserve the point for the consideration of the Court for Crown Cases Reserved. The fact that the learned judge took this course after consulting Martin, B., is important, because a decision of that learned judge was mainly relied on in opposition to the authorities to which attention has been drawn. The case referred to is that of *Reg. v. Winslow* (8 Cox C. C. 397), which it certainly seems difficult to reconcile with *Reg. v. Geering*; but, in view of the circumstance to which attention has been called, it cannot be regarded as certain that Martin, B. deliberately dissented from the view which was adopted in *Reg. v. Geering* and other cases. The learned counsel for the appellants placed much reliance on the case of *Reg. v. Oddy* (2 Denison's Crown Cases Reserved, p. 264), the only one which has been considered by the Court for Crown Cases Reserved. It was there held that on the trial of an indictment containing counts for stealing, and for receiving the property knowing it to be stolen, evidence of the possession by the prisoner of other property stolen some time before from other persons was not admissible upon the count for receiving with guilty knowledge, in respect of which alone it had been admitted by the Recorder. Lord Campbell said that in his opinion there was no more ground for admitting the evidence under the third count (for receiving) than under the first or second (for stealing). Under the two latter it would have been evidence of the prisoner being a bad man, and likely to commit the offence there charged. So under the third count the evidence would only show the prisoner to be a bad man; it would not be direct evidence of the particular fact in issue. Alderson, B. in his judgment said that the evidence merely went to show that the

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prisoner was *in possession* of other property which had been stolen in the previous December, and not that he had *received* such property knowing it to be stolen; that the mere possession of stolen property was evidence *primâ facie*, not of receiving, but of stealing, and to admit such evidence in the case before him would be to allow a prosecutor, in order to make out that a prisoner had *received* property, with a guilty knowledge, which had been stolen in March, to show that the prisoner had in the December previously *stolen* some property from another place, and belonging to other persons. In other words, they were asked to say that, in order to show that the prisoner had committed one felony, the prosecutor might prove that he committed a totally different felony some time before. Their Lordships do not think that the judgments in *Reg. v. Oddy* at all conflict with the judgment in *Reg. v. Geering* and the other cases referred to. Their Lordships do not think it necessary to enter upon a detailed examination of the evidence in the present case. The prisoners had alleged that they had received only one child to nurse; that they had received 10s. a week whilst it was under their care, and that after a few weeks it was given back to the parents. When the infant with whose murder the appellants were charged was received from the mother she stated that she had a child for them to adopt. Mrs. Makin said that she would take the child, and Makin said that they would bring it up as their own and educate it, and that he would take it because Mrs. Makin had lost a child of her own two years old. Makin said that he did not want any clothing; they had plenty of their own. The mother said that she did not mind his getting 3l. premium so long as he took care of the child. The representation was that the prisoners were willing to take the child on payment of the small sum of 3l., inasmuch as they desired to adopt it as their own. Under these circumstances their Lordships cannot see that it was irrelevant to the issue to be tried by the jury that several other infants had been received from their mothers on like representations, and upon payment of a sum inadequate for the support of the child for more than a very limited period, or that the bodies of infants had been found buried in a similar manner in the gardens of several houses occupied by the prisoners. In addition to the question whether the evidence objected to in the present case was admissible the learned judge (as has been stated) reserved for the opinion of the Supreme Court the further questions, whether if not admissible the prisoners were rightly convicted, and, even if inadmissible, whether there was evidence sufficient to sustain the conviction. These questions, and the point of law raised by them, were fully argued before their Lordships, and although their Lordships having arrived at the conclusion that the evidence was admissible it became unnecessary for the determination of the appeal to decide them, their Lordships think it right to state the opinion which they formed upon the important question of law involved.

It was considered by the Supreme Court of New South Wales in the case of *Reg. v McLeod* (11 New South Wales L. R. 218) and led to a difference of opinion amongst the learned judges. That case was brought by appeal to this Board with the view of obtaining its opinion upon the point. The case was, however, determined by their Lordships upon other grounds: (*McLeod v. Attorney-General of New South Wales*, ante, p. 341; 65 L. T. Rep. N. S. 321; (1891) A. C. 455.) The point of law involved is, whether where the judge who tries a case reserves for the opinion of the Court the question whether evidence was improperly admitted, and the Court comes to the conclusion that it was not legally admissible, the Court can nevertheless affirm the judgment if it is of opinion that there was sufficient evidence to support the conviction, independently of the evidence improperly admitted, and that the accused was guilty of the offence with which he was charged. It was admitted that it would not be competent for the Court to take this course at common law, but it was contended that sect. 423 of the Criminal Law Amendment Act of 1888 (46 Vict. No. 17) empowered, if even it did not compel, the Court to do so. That section is in these terms: "The judge by whom any such question is reserved shall as soon as practicable state a case setting forth the same with the facts and circumstances out of which every such question arose, and shall transmit such case to the judges of the Supreme Court, who shall determine the questions, and may affirm, amend, or reverse the judgment given, or avoid or arrest the same, or may order an entry to be made on the record that the person convicted ought not to have been convicted, or may make such other order as justice requires. Provided that no conviction or judgment thereon shall be reversed, arrested, or avoided on any case so stated, unless for some substantial wrong or other miscarriage of justice." Reliance was of course placed upon the language of the proviso. It was said that, if without the inadmissible evidence there were evidence sufficient to sustain the verdict, and to show that the accused was guilty, there has been no substantial wrong or other miscarriage of justice. It is obvious that the construction contended for transfers from the jury to the court the determination of the question whether the evidence, that is to say, what the law regards as evidence, established the guilt of the accused; the result is that, in a case where the accused has the right to have his guilt or innocence tried by a jury, the judgment passed upon him is made to depend not on the finding of the jury but on the decision of the Court. The judges are in truth substituted for the jury, the verdict becomes theirs and theirs alone, and is arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords. It is impossible to deny that such a change of the law would be a very serious one, and that the construction which their Lordships are invited to put upon the enactment would gravely affect the much cherished

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right of trial by jury in criminal cases. The evidence improperly admitted might have chiefly influenced the jury to return a verdict of guilty, and the rest of the evidence which might appear to the court sufficient to support the conviction might have been reasonably disbelieved by the jury in view of the demeanour of the witnesses. Yet the court might under such circumstances be justified or even consider themselves bound to let the judgment and sentence stand. These are startling consequences, which strongly tend in their Lordships' opinion to show, that the language used in the proviso was not intended to apply to circumstances such as those under consideration. Their Lordships do not think that it can properly be said that there has been no substantial wrong or miscarriage of justice, where on a point material to the guilt or innocence of the accused the jury have, notwithstanding objection, been invited by the judge to consider in arriving at their verdict matters which ought not to have been submitted to them. In their Lordships' opinion substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence, and there were substituted for it the verdict of the Court founded merely upon a perusal of the evidence. It need scarcely be said that there is ample scope for the operation of the proviso without applying it in the manner contended for. Their Lordships desire to guard themselves against being supposed to determine that the proviso may not be relied on in cases where it is impossible to suppose that the evidence improperly admitted can have had any influence on the verdict of the jury, as for example where some merely formal matter not bearing directly on the guilt or innocence of the accused has been proved by other than legal evidence.

Solicitors for the appellants, *Yeilding, Piper, and Tallack*.
Solicitors for the respondent, *Want and Co.*

CENTRAL CRIMINAL COURT.

June, 1898.

(Before the COMMON SERJEANT.)

REG. v. MACKAY AND BALL. (a)

Practice—Indictment—Receiving goods obtained by false pretences (24 & 25 Vict. c. 96, ss. 88 and 95)—Necessity of setting out specific false pretences.

In an indictment under 24 & 25 Vict. c. 96, s. 95, for knowingly receiving goods obtained by false pretences under sect. 88, it is necessary to set out the false pretences by which the goods were obtained.

BOTH prisoners were jointly indicted in counts 1, 2, 4, and 5 for unlawfully obtaining by false pretences certain bags of sugar from persons trading as Joseph Traves and Sons, with intent to defraud.

In two counts of the indictment, namely, counts 3 and 6, the prisoner Ball was separately indicted under 24 & 25 Vict. c. 95, for unlawfully receiving the said bags of sugar knowing them to have been obtained by false pretences, and with intent to defraud. The false pretences were duly set out in counts 1, 2, 4, and 5, but in the counts for receiving, namely, 3 and 6, the false pretences were not set out.

Before the defendants pleaded to the indictment,

Arthur Gill, for the prisoner Ball, moved to quash counts 3 and 6 upon the ground that the false pretences alleged therein were not set out. It has never been doubted that in an indictment for obtaining goods by false pretences it is necessary to specify the false pretences: (*Rex v. Mason*, 2 T. R. 581.) They should be set out in order that the court may see what they are, and whether they come within the statute: (*Fuller's case*, 2 East P. C. c. 18, s. 13.) The same principle equally applies to an indictment under sect. 95. All defences open to the person alleged to have obtained the goods are equally open to the person charged with receiving, because it is necessary to prove an offence under sect. 88 before proceeding to prove the offence under sect. 95. There is express authority in point of great weight, namely, *Reg. v. Hill*, Gloucester Spring Assizes, 1851 (see Russell on Crimes, 5th edit., p. 482) which was an indictment under the repealed statute 11 Geo. 4, c. 29, s. 55, of which 24 & 25 Vict. c. 96, s. 95, as far as this point is concerned, is a re-enactment. In that case Greaves, Q.C., the eminent draughtsman of the Criminal Consolidation Act, 1861, held the indict-

(a) Reported by ARTHUR E. GILL, Esq., Barrister-at-Law

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ment bad on motion to quash or demurrer for not setting out the false pretences. This decision was delivered after consultation with Patterson and Talfourd, JJ., who it is stated were both very clearly of opinion that the indictment was bad. It is true that in the precedent given in Archbold's Criminal Pleadings the false pretences are not set out, but that precedent cannot be regarded as trustworthy, as it does not even allege an obtaining of the goods, "with intent to defraud," which must be both laid and proved. The question arose incidentally in *Reg. v. Goldsmith* (L. Rep. 2 C. C. R. 75; 42 L. J. 94, M. C.). But in that case the objection was not taken until after plea pleaded, so that the defect was cured by verdict under 7 Geo. 4, c. 64, s. 21, and in accordance with the common law principle laid down in *Heyman v. The Queen* (L. Rep. 8 Q. B. 103), inasmuch as the indictment followed the words of the statute.

O. F. Gill, for the Crown, contended that it was unnecessary to set out the false pretences. It was not the usual practice to do so, and the dicta in *Reg. v. Goldsmith*, as far as they went, were favourable to that view. It was not necessary to bring home to the receiver knowledge of the precise circumstances under which the goods were obtained, provided that he received them under such circumstances as must have led him to the conclusion that they had been improperly come by. If it was necessary to set out the false pretences, and allege that the receiver knew that the goods had been so obtained, it would be necessary also to prove it. But it would be as a rule impossible to fix the receiver with knowledge of specific false pretences made in his absence. The section would thus be rendered nugatory.

Arthur Gill in reply.—*Reg. v. Hill* was not cited in the argument in *Reg. v. Goldsmith*, and in the latter case Bramwell, B. said: "Had the present objection been taken on demurrer or motion to quash, I am not prepared to say the count would have been good." Setting out the false pretences does not involve the averment that the receiver knew the specific false pretences. After reciting that the goods were obtained by certain specified false pretences, the indictment would conclude by stating that the defendant "unlawfully received and had the goods so as aforesaid unlawfully obtained from the said well knowing the same to have been obtained by false pretences," not "by the said false pretences."

The COMMON SERJEANT.—Nothing appears to have happened to change the law as laid down in *Reg. v. Hill*, which was decided by a very great authority. I shall, therefore, follow that decision, and quash counts 3 and 6.

Ball pleaded not guilty to the other counts upon which no evidence was offered against him, and he was acquitted.

Verdict, not guilty.

Solicitors for the prosecution, *Wontner and Sons*.

Solicitor for the defence, *Solicitors to the Treasury*.

OXFORD CIRCUIT.

WORCESTER SPRING ASSIZES.

Thursday, Feb. 6, 1894.

(Before Lord COLERIDGE, C.J.)

REG. v. PARDOE. (a)

*Arson—Setting fire to dwelling-house, a person being therein—
24 & 25 Vict. c. 97, ss. 2, 7.*

*A prisoner may be indicted under 24 & 25 Vict. c. 97, s. 2, with
setting fire to a dwelling-house, a person being therein; though
the prisoner himself, who set fire to the house, is the only person
therein at the time.*

SAMUEL PARDOE was indicted under 24 & 25 Vict. c. 97, ss. 2, 7, "for that he feloniously, unlawfully, and maliciously did set fire to two window curtains then being in a certain building, to wit, a dwelling-house in possession of him, the said Samuel Pardoe, a certain person, to wit, the said Samuel Pardoe, then being in the said dwelling-house."

The prisoner pleaded guilty to the charge.

R. H. Amphlett for the prosecution.—As the prisoner is undefended, I think it right to draw your Lordship's attention to the fact, that the offence charged is that the prisoner set fire to a dwelling-house, a person being therein, under 24 & 25 Vict. c. 97, s. 3, the person therein being the prisoner himself. It is perhaps arguable that the statute meant to refer to a person inside the dwelling-house other than the prisoner.

Lord COLERIDGE, C.J.—The charge may be supported though the "person therein" is the prisoner himself.

Sentence, eight months with hard labour.

(a) Reported by EDWARD J. GIBBONS, Esq., Barrister-at-Law.

CROWN CASES RESERVED.

Saturday, Dec. 16, 1893.

(Before Lord COLERIDGE, C.J., MATHEW, GRANTHAM, LAWRENCE,
and COLLINS, JJ.)

REG. v. TYRELL. (a)

Aiding and abetting—Soliciting and inciting—Offence against Criminal Law Amendment Act, 1885—Criminality of girl under sixteen—48 & 49 Vict. c. 69, s. 5.

A girl under the age of sixteen cannot be convicted of aiding and abetting the commission upon herself of an offence against the Criminal Law Amendment Act, 1885, nor can she be convicted of soliciting and inciting a male person to commit such an offence upon her.

CASE stated by Robert Malcolm Kerr, Esq., one of the commissioners of the Central Criminal Court, for the consideration of the Court for Crown Cases Reserved as follows :—

Jane Tyrell was, on the 15th day of September, 1893, arraigned before me and pleaded not guilty to the following indictment :

Central Criminal Court to wit. The jurors for our lady the Queen, upon their oath, present that Jane Tyrell, on the thirteenth day of August, in the year of our Lord one thousand eight hundred and ninety-three, at the parish of St. Pancras, in the county of London, and within the jurisdiction of the said court, unlawfully did aid, abet, counsel, and procure the commission by one Thomas Froud, of a certain misdemeanour, by him the said Thomas Froud, then committed, that is to say, for that he the said Thomas Froud, on the day and year aforesaid, at the parish, in the county, and within the jurisdiction aforesaid, in and upon the said Jane Tyrell, a girl above the age of thirteen years, and under the age of sixteen years, to wit, of the age of thirteen years and eight months or thereabouts, unlawfully did make an assault, and her the said Jane Tyrell did then unlawfully and carnally know, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her Crown and dignity.

Second count. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Jane Tyrell, on the day and year aforesaid, at the parish, in the county, and within the jurisdiction aforesaid, falsely, wickedly, and unlawfully did solicit and incite the said Thomas Froud to have unlawful carnal connection with her, the said Jane Tyrell, she the said Jane Tyrell then being a girl above the age of thirteen years, and under the age of sixteen years, to wit, of the age of thirteen years and eight months, or thereabouts, to the great damage of the said Thomas Froud, to the evil example of all others in the like case offending, against the peace of our lady the Queen her Crown and dignity.

The evidence for the prosecution proved conclusively that the defendant, who was under the age of sixteen, aided and abetted and solicited and incited Thomas Froud to have unlawful carnal

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

connection with her, and the defendant was accordingly convicted.

Counsel for the defence, in arrest of judgment, submitted that the indictment disclosed no offence in law. This objection I overruled, but allowed the prisoner to go upon entering into her own recognisance to come up for judgment when called upon.

I reserved, at the request of defendant's counsel, for the opinion of this Court the question,

Whether it is an offence for a girl between thirteen and sixteen years of age, to aid and abet a male person in the commission of the misdemeanour of having unlawful carnal connection with her, or to solicit and incite a male person to commit that misdemeanour.

By sect. 5 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), it is enacted (*inter alia*) that:

Any person who unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen years, and under the age of sixteen years . . . shall be guilty of a misdemeanour.

Clarke Hall (with him *Campbell*), on behalf of the prisoner, submitted that the Criminal Law Amendment Act was merely a consolidating Act, and created no new offence; that at common law no one could commit a crime against himself except it were the crime of mayme; the reason why that was a crime being that the life and members of every subject are under the safeguard and protection of the Crown, to the end that they may serve their Crown and country when occasion offers. Coke on Littleton (s. 127, note b) says: "On my circuit in anno 1, Jacobi regis, in the county of Leicester, one Wright, a young strong and lustie rogue to make himself impotent, thereby to have the more colour to begge, or to be relieved without putting himself to any labour, caused his companion to strike off his left hand, and both of them were indicted, fined, and ransomed therefore, and that by the opinion of the rest of the justices, for the cause aforesaid." And in *Hawkins*, P. C. p. 176, vol. 1, edit. 1278, it is laid down that, "By the common law, if a person maim himself, in order to have a more specious pretence for asking charity, or to prevent him being impressed as a sailor, or enlisted as a soldier, he may be indicted, and, on conviction, fined and imprisoned." This, however was the only crime that could be committed by a person upon himself. In the second place, that common law principle has been recognised by modern legislation in sect. 7 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100). So, too, in the case of abortion, a woman is only indictable under that section if she is with child, the gist of the offence being the taking of life. In drafting the indictment in *Reg. v. Whichchurch* (24 Q. B. Div. 420) for conspiring to procure abortion against a woman who believed herself contrary to the fact to be with child, if the woman could have been indicted for aiding and abetting, it is obvious that she would have been so indicted. The law of conspiracy is quite different from the law of aiding and abetting,

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and the principles which govern the one class of crime are inapplicable to the other. Though, therefore, the girl might have been convicted of conspiracy, it did not follow that she could be convicted of aiding and abetting. The second count he submitted was based upon the common law, it having been held in *Reg. v. Higgins* (2 East, 5) that to solicit a servant to steal his master's goods is a misdemeanour, and in Stephen's History of the Criminal Law, vol. 2, p. 230, it being stated that, "A person who 'counsels, procures, or commands another to commit either a felony or a misdemeanour is guilty of the misdemeanour or incitement if the offence suggested is not committed, and if it is committed he is an accessory before the fact if the offence is felony, and a principal if the offence is either treason or misdemeanour.'" There must, however, be an offence; and it follows that, if the first count failed, the second count being based upon the fact of the commission of such an offence as is alleged in the first count, must of necessity fail also. There being no such crime as that alleged in the first count created by the indictment, the prisoner could not be convicted of soliciting or inciting the commission of that which was not criminal. One of the consequences of upholding the conviction would be, that a girl who had been seduced could be convicted of aiding or abetting, or soliciting or procuring her seduction. The sole object of the enactment was to prevent its being considered that a girl of immature mind had consented to the act committed upon her. The 4th section shows that, if the contention of the prosecution were to be held to be correct the prisoner, had she been under the age of thirteen years, would have been liable to penal servitude for life. Were the construction put upon the Act which the prosecution sought to place upon it, it would be rendered practically inoperative, as it was not likely that parents would allow their children to run the risk of prosecution by giving information of offences committed upon them. Lastly, the Act having been passed expressly to prevent its being said when prosecuting the man that a girl under the age of sixteen could consent, it could not be construed as meaning that she could be considered to have consented for the purpose of herself being prosecuted.

Dutton, in support of the conviction, submitted that there was nothing in the Act to prevent a girl being convicted of the offence with which she was charged; and that the jury having found upon the clearest evidence that she did incite the boy to commit the act, the conviction should stand.

LORD COLERIDGE, C.J.—I believe that I am expressing the opinion of my learned brothers when I say that this conviction must be quashed. This Act of Parliament was passed, and enacted after a great deal of disputing and fighting in the House of Commons, and a great deal of controversy took place as to the point at which the age of consent was to be fixed. It ended in a compromise; and it is not for us to dispute whether it was wisely or unwisely fixed at the age of sixteen. What was

intended by the Legislature was to protect girls against themselves, and it cannot be said that an Act which says nothing at all about the girl inciting or anything of that kind, and the whole object of which is to protect women against men, is to be construed so as to render a girl against whom an offence is committed equally liable with the man by whom the offence is committed. In my opinion this conviction cannot be sustained, and must therefore be quashed.

MATHEW, J.—I am of the same opinion. I fail to see how this argument on the construction of the statute can be supported. The consequences of upholding this conviction would, as has been pointed out in the course of the argument, be most serious, there being scarcely a section in the Act which would not, upon the construction sought to be put upon the Act, support a criminal prosecution against a girl. There is no trace anywhere in the Act of any intention on the part of the Legislature to deal with the woman as a criminal, and I am of opinion that the Act does not create the offence alleged in the indictment.

GRANTHAM, LAWRENCE, and COLLINS, JJ. concurred.

Conviction quashed.

Solicitor, *Morton Phillips*.

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Saturday, Dec. 16, 1893.

(Before Lord COLERIDGE, C.J., MATHEW, GRANTHAM, LAWRENCE, and COLLINS, JJ.)

REG. v. TANKARD. (a)

Practice—Indictment—Property—Illegal association—Embezzlement of moneys received on behalf of illegal club—Beneficial ownership of members—24 & 25 Vict. c. 89, s. 4—31 & 32 Vict. c. 116, s. 1.

The members of an unregistered club, having for its object the acquisition of gain by such members, which is illegal owing to non-compliance with the requirements of sect. 4 of the Companies Act, 1862, are the beneficial owners of the property of such club. It is therefore right, in an indictment for stealing or embezzling

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

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moneys paid to the treasurer on behalf of such a club, to lay the property in the moneys in the individual members of the club as beneficial owners.

CASE stated for the consideration of this Court by the Recorder of Bradford, as follows:—

At the Court of Quarter Sessions of the Peace, held at Bradford on the 20th day of October, 1893, the prisoner was arraigned upon and pleaded not guilty to an indictment of which the material parts are as follows:—

1. That Michael Naylor Tankard, being on the 28th day of July, 1893, then one of a number of beneficial owners, called the Bowling Feast Club, consisting of the said Michael Naylor Tankard, William King Jackson, and others, did then, and whilst he was one of the said beneficial owners as aforesaid, receive and take into his possession certain money to the amount of five shillings, for and in the name of and on account of the said beneficial owners as aforesaid, and the said money then fraudulently and feloniously did embezzle, and the jurors on their oath aforesaid do say that the said Michael Naylor Tankard, then in manner and form aforesaid, the said money the property of the said beneficial owners as aforesaid, from the said beneficial owners as aforesaid feloniously did steal, take, and carry away, against the form of the statute, &c.

2. There were other similar counts alleging embezzlement of other amounts.

3. It was proved that the prisoner, Michael Naylor Tankard, William King Jackson, and some twenty-eight other persons were the members of and constituted the Bowling Feast Club mentioned in the indictment.

4. It was proved that the club traded with its members in coal and cloth, from which trading profits were made, and that profits were also derived by it from fines paid by the members, and from interest paid by the members on loans from the club to them at varying rates, and that the whole of the proceeds of the club, consisting of such profits and the subscriptions, were divided equally amongst all the members at a fixed period in each year.

5. The prisoner was treasurer of the Bowling Feast Club.

6. It was proved that on the 28th day of July, 1893, the prisoner was unable to produce or account for the money which he had received on account of the club, and for which he was accountable under the rules of the club, that he could not account for amounts, as laid in the indictment, that there was a general deficiency of over 150*l.*, and that he absconded.

7. At the close of the case for the Crown it was submitted by counsel for the prisoner that the prosecution had failed to prove any offence under the indictment, on the ground that the Bowling Feast Club in which the property was laid was illegal, owing to the provisions of sect. 4 of the Companies Act, 1862

(25 & 26 Vict. c. 69) and incapable of holding any property, and that the said club had no existence in law, and that the members of it could have no legal beneficial ownership as the Bowling Feast Club.

8. The case was left to the jury and the prisoner was convicted, and was sentenced to six months' imprisonment with hard labour, which sentence, in the absence of approved bail, he is now undergoing.

9. The question reserved at the desire of the prisoners' counsel for the opinion of this Court is, whether the prisoner was properly convicted on the indictment.

By sect. 1 of 31 & 32 Vict. c. 116, it is enacted that,

If any person, being a member of any copartnership, or being one of two or more beneficial owners of any money, goods, or effects, bills, notes, securities, or other property, shall steal or embezzle any such money, goods, or effects, bills, notes, securities, or other property, of or belonging to any such copartnership or to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted, and punished for the same as if such person had not been or was not a member of such copartnership, or one of such beneficial owners.

By sect. 4 of the Companies Act, 1862 (25 & 26 Vict. c. 89), it is enacted that,

No company, association, or partnership, consisting of more than ten persons shall be formed, after the commencement of this Act, for the purpose of carrying on the business of banking, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent; and no company, association, or partnership, consisting of more than twenty persons, shall be formed, after the commencement of this Act, for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries.

R. D. Wright, on behalf of the prisoner, submitted that, inasmuch as the association, the money of which the prisoner was charged with embezzling, was an association for the acquisition of gain of more than twenty persons, which was prohibited by the Companies Act, and therefore illegal, the prisoner could not be convicted of embezzling its money; that such an association being prohibited by law could have no legal existence, and could not therefore own money. [Lord COLERIDGE, C.J.—The Court held, in *Reg. v. Stainer* (L. Rep. 1 C. C. R. 230; 39 L. J. 54, M. C.), that a society, the rules of which were void as being in restraint of trade, was not prevented from prosecuting a servant for embezzlement.] But, then, it is submitted the society was not prohibited by law as here, and could, had its rules not been void, have had a legal existence. Such an association as the present would have no civil remedy for the recovery of its money. [GRANTHAM, J.—The case of *Tennant v. Elliot* (1 B. & P. 8) shows that a person who has received money to the use of another upon an illegal contract, cannot set up the illegality of the contract in an action by such other person for the recovery of the money.] That might be so

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here if the association could sue, but it has no legal existence, and cannot therefore bring an action. In *Re Padstow Total Loss and Collision Assurance Association* (45 L. T. Rep. N. S. 774; 20 Ch. Div. 137) the Court of Appeal held that such an association could not for this reason be wound-up by the court. In *Reg. v. Hunt* (8 C. & P. 642) it was held that a person charged with embezzlement as a clerk and servant to a society which, in consequence of the administering to its members an unlawful oath, was an unlawful combination and confederacy under 39 Geo. 3, c. 79, and 57 Geo. 3, c. 19, s. 25, could not be convicted. Here the effect of the prohibition of this society was the same as if it had been rendered a criminal offence to take part in such a combination, and no indictment could be supported which laid property in such a society. [Lord COLERIDGE, C.J.—I see that, in *Reg. v. Boulton* (5 C. & P. 537), the Court held that the property in a Bible had been rightly laid in a dissenting minister and others, they being the trustees of a society of Wesleyans.] But there was no law which rendered it illegal for such a society to possess Bibles, whereas here this association could not exist at all. He also cited *Reg. v. Robson* (53 L. T. Rep. N. S. 823; 16 Q. B. Div. 137; 55 L. J. 55, M. C.).

W. Beverley, on behalf of the prosecution, was not called upon.

Lord COLERIDGE, C.J.—This is an indictment which is laid under 31 & 32 Vict. c. 116, s. 1, which is in these terms: [His Lordship read the section, *vide sup.*]. Now I must say that I agree with my brother Grantham that it would seem almost as if this Act had been passed to sweep away any objection of this kind. Here are a number of people who join together, not for a criminal purpose, but for a purpose which is not legalised. Their joining together is not legalised; that is to say, they are not a company. But the members are nevertheless beneficial owners, and in one of the paragraphs of the case stated for our opinion it is stated that the prisoner was one of a number of beneficial owners, and that the property was laid in the indictment in the members of the club as beneficial owners. It is true that they are not incorporated, and that apart from the actual physical existence of the members they have no legal existence as a company. But it does not follow that because they do not exist as a legal company they have no legal existence as individuals. It has been decided with regard to friendly societies that it did not follow that, because they did not in all respects comply with the law as to such societies at the time, they were not to be treated as if they did not exist at all, and it was put on the ground that they were not criminal associations, and that therefore they could possess property. The moment it was admitted that the argument involved the necessity of admitting that this money belonged to nobody, and that anybody might scramble for it, counsel for the prisoner put himself out of court, and as that is the only objection taken to the conviction, I am of opinion that the conviction was right, and must be affirmed.

MATHEW, GRANTHAM, LAWRENCE, and COLLINS, JJ. were of the same opinion.

Conviction affirmed.

Solicitor for the prosecution, *The Solicitor to the Treasury.*
Solicitor for the prisoner, *M. Banks Newell, Bradford.*

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CROWN CASES RESERVED.

Saturday, Dec. 16, 1893.

(Before Lord COLERIDGE, C.J., MATHEW, GRANTHAM, LAWRENCE,
and COLLINS, JJ.)

REG. v. STEWARD. (a)

*Embezzlement—Clerk or servant—Director of company employed
to collect moneys on behalf of company—24 & 25 Vict. c. 96,
s. 68.*

*The fact that a person employed to collect moneys on behalf of a
company of which he is a shareholder, is also a director of such
company does not prevent such person from being convicted of
embezzling moneys collected by him on behalf of the company,
within the meaning of 24 & 25 Vict. c. 96, s. 68.*

CASE stated by the Deputy Chairman of the North London
Court of Quarter Sessions, from which it appeared that on
the 23rd day of June, 1893, Charles Edward Steward was
arraigned before him at the North London Sessions, sitting at
Clerkenwell, on an indictment for embezzling 5*l.*, the moneys of
Scott and Company Limited, his employers; and that the
prisoner had entered into the following agreement with the
prosecutors, which was put in evidence, viz.:

Memorandum of agreement made the 1st Nov. 1890, between Messrs. Scott and
Company Limited (late Glover and Company Limited (incorporated under the
Companies Acts, 1862, to 1883 (hereinafter called the company) of the one part,
and Charles Edward Steward, of 61, Choumert-road, Peckham, in the county of
London, advertisement manager, of the other part. Whereas it has been agreed
by and between the company and the said Charles Edward Steward, that the said
Charles Edward Steward shall be reappointed, and engaged as manager of the
company (whose business is that of advertisement contractors), subject to the
conditions and agreements hereinafter contained. Now, therefore, it is hereby
agreed as follows:

1. The company hereby agrees to take the said Charles Edward Steward in their

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

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employ as manager for a period of twelve months from the eleventh day of November last, and so on from year to year, determinable (subject to the provisions and stipulations hereinafter contained) by either party giving to the other three calendar months notice of such his or their intention to determine the same, at a weekly salary of three pounds ten shillings.

2. The said Charles Edward Steward hereby agrees to continue the post of manager to the said company, at the said salary of three pounds ten shillings per week, and hereby further agrees to devote the whole of his time to the business of the company, and will report daily if required the progress and work done by him, and leave the said report in writing at the offices of the company, No. 36, Southampton-street, Strand, for the secretary or his nominee.

3. That the said Charles Edward Steward shall have at any time within twelve calendar months from the eleventh day of November, 1890, the option of purchasing the business of the said company at such a price as may be agreed upon by the directors and shareholders of the company and the said Charles Edward Steward; but should the said company at any time during the said twelve months receive an offer (which the directors and shareholders consider sufficient) from any person or persons, company or companies, to purchase the business of the said company, whether by taking over the business of the said company, or by winding-up the same, and registering another company, or any like matter, the said Charles Edward Steward shall be called upon to exercise his option of purchasing the said business at the same price as that which has been offered; such option to be exercised within one calendar month from the date of the notice to him of the receipt by the company of the offer to purchase the said business and the amount of the purchase money shall be stated therein. But if the said Charles Edward Steward shall decline or neglect to become the purchaser within the period of one month, he shall notwithstanding be entitled to the three months notice hereinbefore provided for determining his engagement.

4. And lastly it is hereby mutually agreed that, if the said Charles Edward Steward shall devote or employ any of his time for any purpose or business detrimental to the company, or receive or take orders for advertising on behalf of any other advertising contractor or contractors without the consent of the directors of the said company, then the company shall be at liberty to determine or put an end to this agreement by giving one month's written notice to the said Charles Edward Steward, and without any compensation or salary in lieu of the three months notice, and the said Charles Edward Steward shall cease to have any connection with the said company whatsoever.

As witness the hand of the said Charles Edward Steward and the common seal of the company, the day and year first above written.

CHARLES E. STEWARD, Nov. 25, 1890.

Witness, LYDIA C. GOULD, Book-keeper.

The common seal of the company was duly affixed in the presence of JOHN D. FIGOTT, E. G. DULCKEN, Directors.

The case then stated as follows :

1. It was proved that the prisoner's duties were to canvass for orders for advertising, and superintend the bill-posting, and collect the moneys due to Scott and Co. Limited, and to pay them over to the cashier of the company, as and when he collected them. It was also proved that the prisoner was a director and shareholder of Scott and Co. Limited, and as such director had to vote on the questions of his own salary and duties, and that he attended the meetings of the board, and took part as a director in the management of the business of the company, and that the prisoner was allowed one guinea a week for travelling expenses by a resolution of the company.

2. It was further proved that at an extraordinary general meeting of the company, held on the 4th day of June, 1892, the prisoner attended as a shareholder, and took part in the discussion as to his own dismissal, and in the other subjects before the meeting, and at the said meeting the prisoner was dismissed by the vote of the shareholders present.

3. At the close of the case for the prosecution the counsel for the prisoner submitted that the prisoner's position and powers as a director of Scott and Co. Limited, as explained by the above evidence, including the agreement in question, were inconsistent with his being a person employed in the capacity of a servant to the company, within the meaning of sect. 68 of 24 & 25 Vict. c. 96, and asked me to withdraw the case from the jury.

4. I, however, left the case to the jury, and directed them that, if they were of opinion that the prisoner was in fact employed in the capacity of a clerk or servant by Scott and Co. Limited, the fact that he was a director of that company, as explained by the evidence, including the above agreement, did not in law prevent his being amenable to the above indictment, because I held that his appointment as a servant was a distinct and separate office apart from his duties as a director, as evidenced by the above agreement, but reserved the point for the consideration of the Court.

5. The jury found the prisoner guilty, and I admitted him to bail pending the decision of the Court of Crown Cases Reserved.

6. The question for the opinion of the Court is whether, on the facts above stated, the prisoner was rightly convicted.

By 24 & 25 Vict. c. 96, s. 68, it is enacted that,

Whoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security, which shall be delivered to or received or taken into possession by him, for or in the name or on account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money, or security was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant, or other person so employed.

Warburton, on behalf of the defendant, submitted that, inasmuch as the defendant at the time he entered into the agreement with the company was a director of the company, he could not be convicted of embezzlement as a clerk or servant within the meaning of 24 & 25 Vict. c. 96, s. 68; that as a director he represented the shareholders, and was therefore practically the company, and could not employ himself as a servant. In *Reg. v. Waite* (2 Cox C. C. 245) it was held that a clerk of a friendly society who was also a member of the society, being a part owner of the moneys of the society, could not be convicted of embezzlement of the moneys of the society. A clerk or servant within the section must be someone who is under contract to give his whole time to the orders of some other person. He must therefore be a subordinate, and cannot be his own master. There was another section of the Act of Parliament, namely, sect 81, under which the prisoner could certainly have been indicted for misdemeanour. In *Reg. v. Taffs* (4 Cox C. C. 169) it was argued that a member of a society could still be a clerk or servant to it, if employed in that capacity; but Maule, J. held that the prisoner, being in the position rather of partner than of servant of the society of which

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he was a member, could not be convicted of embezzlement of the moneys of the society.

R. D. Muir, for the prosecution was not called upon.

LORD COLERIDGE, C.J.—It appears to me that in this case the proper question was left to the jury, and that they have answered it very properly. It is true that the prisoner acted in two capacities, as a director and as a servant of the company. He was a servant, not of himself, however, but of the company. Mr. Warburton was obliged to admit that his argument told equally against every shareholder of the company as against a director, which is a *reductio ad absurdum* of the argument. Here the prisoner was employed outside his functions as a director, and appropriated the money of the company while so employed; the conviction must therefore, in my opinion, be upheld.

MATHEW, GRANTHAM, LAWRENCE, and COLLINS, JJ. concurred.

Conviction affirmed.

Solicitor for the prosecution, *W. H. Armstrong*.

Solicitors for the prisoner, *Wilson and Wallace*.

QUEEN'S BENCH DIVISION.

Dec. 18, 1893, and Jan. 20, 1894.

(Before HAWKINS and LAWRENCE, JJ.)

JONES (app.) v. JAMES (resp.) (a)

Adulteration—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 2 and 3—Food, definition of—Sale of baking powder containing injurious ingredient.

Baking powder is not an article of food or an article used for food within sect. 2 of the Food and Drugs Act, 1875; and the seller of a baking powder composed of bicarbonate of soda (20 per cent.), alum (40 per cent.), and powdered rice (40 per cent.), cannot be convicted under sect. 3, although one of the results of the chemical action between the alum and the bicarbonate of soda is to leave in the bread, &c., into which the baking powder has been introduced, a residue of hydrate of alumina, a substance which is injurious to the health of man.

THIS was a case stated by the justices of Glamorganshire sitting in quarter sessions at Swansea, to hear an appeal from a conviction under the Food and Drugs Act, 1875.

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

The appellant James Jones had been convicted by four justices of the county of Glamorganshire at the instance of the respondent, an inspector, for an offence under sect. 3 of the Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), which provides that :

No person shall mix, colour, stain, or powder, or order or permit any other person to mix, colour, stain, or powder any article of food with any ingredient or material so as to render the article injurious to health, with intent that the same may be sold in that state, and no person shall sell any such article so mixed, coloured, stained, or powdered under a penalty.

The appellant was charged with an offence under the latter part of this section in having sold a penny packet, containing one ounce of "Excelsior Baking Powder." The powder was sold as a cheap substitute for yeast, to be used in the making of bread and articles of confectionery, which by the generation of carbonic acid gas it tended to make light and easily digestible. The baking powder in question consisted of 20 per cent. of carbonate of soda, 40 per cent. of alum, and 40 per cent. of ground rice. The rice was added merely as a vehicle or medium to prevent injury from damp, and to prevent chemical action taking place before the powder was placed in the dough. One of the results of the chemical action of the alum and the bicarbonate was the liberation of the carbonic acid gas, which permeated the mass of dough and made it light; many acid substances could be used in place of alum to bring about the result, *e.g.*, tartaric acid, which, however, had the disadvantage of being more expensive. When alum is used as the acid re-agent, a residue of hydrate of aluminum remains in the bread, hydrate being a substance which is injurious to health.

The justices were of opinion that baking powder was an article of food within sect. 2 of the Food and Drugs Act, 1875, which provides that,

The term food shall include every article used for food or drink by man, other than drugs or water,

And they also thought that, by the introduction of alum, the powder had become mixed with an ingredient or material so as to render it injurious to health. Their decision was upheld at quarter sessions, subject to the present case, in which the decision of the High Court was asked by the justices upon the two following questions, *viz.*: 1. Whether baking powder is an article of food, or an article used for food, within the meaning of the Food and Drugs Act, 1875? 2. Whether, if baking powder is an article of food or used for food, there is evidence in the present case to support the justices' decision that the appellant sold the same to the respondent mixed with a certain ingredient, to wit, alum, injurious to health?

Sir *R. E. Webster* Q.C., *Brynmor Jones*, Q.C., and *Macmorran*, for the appellant Jones, argued that baking powder was not an article of food within the definition of "food" in the Food and Drugs Act, 1875. It was only an inexpensive substitute for yeast, and was not sold as food, but to assist in the manufacture

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of food. Secondly, there was no evidence upon which it could be found that the appellant sold the baking powder mixed with an ingredient injurious to health; for until the alum (the alleged injurious ingredient) was added to the bicarbonate of soda it was not baking powder at all. The alum was an essential element of this baking powder, which is sold pure, without being mixed with anything at all.

Finlay, Q.C., and Rhys Williams, contra, for James, the respondent.—This baking powder was an article of food within the Act of 1875. True it was not eaten by itself, but neither are pepper and mustard, which are undoubtedly articles of food; it was intended to be used in the compounding of bread and confectionery, and some of it survived the process of manufacture and was eaten, being every bit as much an article of food as the salt which was added to the flour; even the flour, an undoubted article of food, was not eaten as flour, but had to be first altered by cooking, and each ingredient of the bread (including the salt, the flour, and the baking powder) was an article of food. The question whether or not a particular article was an article of food is one of fact, and in this case that question was decided in the appellant's favour in the court below. Secondly, there was here a mixing with an injurious ingredient according to the ordinary meaning of the word "mix."

Sir *R. E. Webster* replied.—The expression "for food" was the same as "food," and did not mean "in the preparation of food."

Our. adv. vult.

Jan. 20, 1894.—*HAWKINS, J.*—James Jones, the appellant, was on the 15th day of Feb., 1893, convicted by four justices for the county of Glamorgan, for that he, on the 10th day of Dec., 1892, "unlawfully did sell to the respondent, Evan James, an inspector under the Food and Drugs Act, a certain article of food, to wit, baking powder, which was mixed with a certain ingredient, to wit, alum, injurious to health." Against this conviction Jones appealed to the general quarter sessions for the said county, when the conviction was confirmed and the appeal dismissed with costs, subject to the opinion of the Queen's Bench Division upon a special case, which was argued before us on the 18th day of Dec. last. The facts found on the hearing of the appeal are fully set forth in the case, but may be stated shortly as follows: On the 10th day of Dec., 1892, the appellant sold to the respondent a packet of baking powder, described on the outside of the wrapper, a copy of which is annexed, as "Excelsior Baking Powder, for making light and wholesome pastry, puddings, &c., without yeast." On the wrapper are also printed directions how and in what proportions to mix the powder in a dry state with flour, and then to convert the mixture so made into dough. The object of mixing the baking powder with the flour is to generate and diffuse through the dough a sufficient quantity of carbonic acid gas to cause it to expand or

rise, and so render the bread, cakes, and pastry, when baked, light and digestible. The Excelsior Baking Powder is composed of 20 per cent. of bicarbonate of soda, 40 per cent. of alum, and 40 per cent. of ground rice. Carbonic acid gas is contained in the bicarbonate of soda. To liberate this gas properly, a chemical combination of an acid with the bicarbonate of soda is necessary. To effect this combination, alum is used. The ground rice is added merely for the purpose of preserving the compound from injury by damp, and thus preventing chemical combination before actual use in dough. The ground rice does not pass off with the carbonic acid gas, but remains in the bread together with the alum, which, by the mutual action between it and the bicarbonate of soda, assumes the form of hydrate of alumina, in which form it is eaten with the bread and is injurious to health. The Sale of Food and Drugs Act, 1875, in its preamble, recites that it is desirable that the law regarding the sale of food and drugs in a pure and genuine condition should be amended. The interpretation clause (sect. 2) enacts that the term "food" shall include "every article used for food or drink by man other than drugs or water." Sect. 3 enacts that no person shall mix, or order or permit any other person to mix, any article of food with any ingredient or material so as to render the article injurious to health, with intent that the same may be sold in that state, and no person shall sell any such article so mixed under a penalty not exceeding 50*l.* for the first offence. We are asked by the case to say, first, whether baking powder is an article of food within the meaning of the statute; secondly, whether, assuming it to be so, there is evidence to support the finding that the appellant sold the same to the respondent mixed with an ingredient—to wit, alum—injurious to health. It will be observed that sect. 3 creates two distinct and separate offences, one the mixing or causing to be mixed any article of food with any ingredient rendering such article injurious to health, with intent that so mixed the same may be sold; the other, the actual selling of an article of food so injuriously mixed. The latter is the offence charged against the appellant. These are the only offences pointed at in sect. 3. The mere sale of an article, not itself an article of food, but which mixed with an article of food would render it injurious to health, is not an offence under sect. 3. To sell alum, the injurious drug in this case, which is clearly not an article of food, even though it be sold with the knowledge of the vendor that it is the buyer's intention to mix it with the ingredients of which an article of food—*e.g.*, bread—is to be composed, is no offence under sect. 3; and it makes no difference in a legal point of view that when sold it is mixed with other ingredients not in themselves hurtful, some or one of which in an unmixed state might be used as articles or an article of food, if the injurious and the harmless ingredients are so inseparably mixed and in such quantities as that the mixture as a whole forms an injurious compound which nobody would

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dream of using as food. For instance, take this Excelsior Baking Powder. Of course it could be truly said that pure ground rice is an article of food for man, but it would cease to be so if it were mixed with an equal quantity of alum and 20 per cent. of bicarbonate of soda, and sold in penny packets of an ounce each. Who would venture to describe such a mixture as food for man? With equal truth might powder composed of poison mixed with flour be called food for man because pure flour is so used. Possibly it may be said that the injurious ingredients when mixed with other materials of which an article of food is composed become a part and parcel of such articles; but that is no argument against the vendor of such injurious ingredients, unless such ingredient can be treated as an article of food at the time of sale. That is the moment when the test of its character is to be applied, and, if it be not then an article of food, no offence is committed by the vendor of it, though the purchaser or any other person who afterwards mixes it with an article of food intended for sale would be guilty of an offence for such mixing if that were done with intent to sell. We are clearly of opinion that the baking powder in question is not an article of food, and neither the sale of it nor the admixture of it with an article of food, unless such article is intended for sale, is an offence within the criminal provisions of the Sale of Food and Drugs Act. For his own use anybody may make use of it if he thinks fit, and it would certainly seem strong if, for selling such a mixture to a person who had a right to mix it with the ingredients forming his own bread or pastry, the vendor could be convicted of a criminal offence. We do not, however, in anything we have said, intend to convey it as our opinion that nothing can be deemed to be an article of food unless it be made up into an eatable or drinkable form and fit for immediate use, for we have no doubt that the substantial and requisite materials for making, and which are to form part of, the unadulterated article when made—*e.g.*, flour, butter, salt, mustard, pepper, &c.—are articles of food, for, though no one would ordinarily dream of eating these things alone, yet they are articles intended to form substantial components of articles of food, or to be eaten as adjuncts thereto. Such, however, is not the character of baking powder. We think the court of quarter sessions was wrong in treating the baking powder in question as an article of food, or used for food. It is unnecessary to answer the second question. The order of quarter sessions and the original conviction must be quashed.

Appeal allowed. Order of quarter sessions and conviction quashed.

Solicitors for the appellant, *Flux, Leadbitter, and Co.*, for *Tillett*, Norwich.

Solicitors for the respondent, *Iliffe, Henley, and Sweet*, for *W. E. R. Allen*, Cardiff.

QUEEN'S BENCH DIVISION.

Monday, Nov. 27, 1893.

(Before WILLS AND WRIGHT, JJ.)

MIDLAND RAILWAY COMPANY v. EDMONTON UNION. (a)

Quarter sessions—Continuing court—Practice—Consent to tax costs out of sessions.

A court of quarter sessions is a continuing court, and may determine the effect of an order made at a previous sessions.

Where nothing has been said to the contrary, consent to tax the costs of appeal to quarter sessions out of sessions may be implied from the universal custom so to do.

THIS was a rule to quash an order of the Quarter Sessions of Middlesex, removed into court by an order of Wills, J., dated the 29th day of June, 1893.

On the 9th day of April, 1892, the Midland Railway Company entered an appeal against a poor rate made on the 12th day of November, 1891. The appeal was heard by quarter sessions on the 13th day of July, 1892, and judgment was given for the appellants with costs. Nothing was said at the time of the hearing about taxing costs out of court; but in November the company's solicitor sent in a bill of costs to the clerk of the peace, who gave an appointment to tax on the 5th day of December. On that day the solicitor for the Edmonton Union objected that no consent had been given to tax out of court, and the deputy clerk of the peace upheld the objection, and decided that he would not proceed with the taxation. On the 7th day of January, 1893, the Court of Quarter Sessions was moved on behalf of the company for leave to tax the costs of the appeal. The court allowed the motion, and amended the order made at the hearing on the 13th day of July of the previous year so as to direct that the respondents, the Edmonton Union, should pay to the clerk of the peace, for the appellants, 206*l.* 17*s.* 7*d.* costs within fourteen days of service of the order on them. Of this sum 16*l.* 18*s.* 6*d.* were for the costs of the motion at the sessions of January, 1893. The order of quarter sessions was moved into the High Court to be enforced under sect. 18 of Baines' Act (12 & 13 Vict. c. 45), and on the 7th day of August, 1893, a rule *nisi* was obtained on behalf of the Edmonton Union, on the grounds that the order was not the order made by the quarter

(a) Reported by MERVIN LL. PERL, Esq., Barrister-at-Law.

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Sessions in the said appeal, and that it was in excess of the jurisdiction of the Court of Quarter Sessions.

Balfour-Browne, Q.C., and *E. Page* against the rule.—In the first place, the rule obtained by the other side is too wide. To quash the order of quarter sessions would not only enable the Edmonton Union to escape paying us our costs, but would also get rid of the decision of the appeal, against which there is nothing alleged. It is admitted to be the general practice to tax costs out of court as has here been done, and this practice is not only highly convenient, but in some cases necessary, as otherwise, the costs of the last case tried at sessions could never be taxed at all. From this universal custom the consent of the other side may be implied. The brief of counsel for the Edmonton Union was actually by mistake indorsed “costs to be taxed out of court,” so much was it considered a matter of course that the application would be made and granted. This indorsement is of course no evidence of any express consent, as it is admitted that there was none: but it is sufficient to show that consent was implied, and therefore to support the order of quarter sessions, who, having considered the facts, have come to the conclusion that there was evidence of consent. *Southampton Gas Light and Coke Company v. Guardians of the Southampton Union* (36 L. T. Rep. N. S. 548; 2 Q. B. Div. 371; 46 L. J. 238, M. C.) shows that costs may be taxed out of court without express consent.

Poland, Q.C., and *R. Cunningham Glen* for the rule.—The order of quarter sessions is bad. The legal proposition is, that the power of quarter sessions is limited to the period of sessions. The clerk of the peace has no power to tax after the court has ceased to sit. The parties have a right to have a chairman of the court in existence at the time of taxation for them to appeal to in case of necessity. The only thing that can take them out of this rule is an express consent to tax out of court. If this consent was not given, the order of quarter sessions cannot be valid. It is said consent may be implied; but it is not a matter of course that there should be consent. The client might not have confidence in the clerk of the peace. He might wish to be able to appeal to the chairman. *Southampton Gaslight and Coke Company v. Guardians of the Southampton Union* (*ubi sup.*) is really in our favour. During the argument, Lush, J. said: “There is nothing irregular or illegal in taxing out of sessions when the parties agree to it;” and in giving judgment he said: “If the costs had been given by the Court of Quarter Sessions under 12 & 13 Vict. c. 45, s. 5, I think the taxation of costs out of sessions would have been invalid, unless there had been consent of the parties to such taxation.” [WILLS, J.—But he says further on, “If the appellants intended to make this stipulation I think they ought to have said so.”] If the contention of the other side is right it would be necessary to hold that, where nothing is said, consent may be implied. The case does not go as far as that in any view of it. Then the order made at the

January sessions of 1893, amending the previous order, is a nullity. The court is differently constituted, and it might well be that the chairman would be different. The order to pay the extra 16l., the costs of those proceedings, is therefore, of course, also *ultra vires*. Our objection to the order is like that taken in *Reg. v. Hellier* (21 L. J. 3, M. C. ; 17 Q. B. 229), and must prevail for the reasons there given. [WRIGHT, J.—Both in that case, and in *Reg. v. Goodall*, (L. Rep. 9 Q. B. 557 ; 43 L. J. 119, M. C.), the order objected to was bad on the face of it.] At all events the order made in January, 1893, is bad, and the order of July, 1892, which is really the order in the case, can no longer be enforced, as the quarter sessions which made it are no longer sitting. It cannot be said that the clerk of the peace is the officer of quarter sessions. He holds an office under the Lord Lieutenant. The order now before the Court does not represent the true order of quarter sessions, and should be set aside.

WILLS, J.—I am clearly of opinion that our decision ought to be in favour of the appellants at quarter sessions. I confess I have serious doubts whether an objection like the present can be taken at this stage of the proceedings at all. Certainly, in deference to what Patteson, J. says in *Reg. v. Hellier* (*ubi sup.*), I should say that the objection must be confined to the order itself. Both in that case and in *Reg. v. Goodall* (*ubi sup.*) the objection was to the order as it stood. However, it is not necessary for us to decide that question. It will be sufficient if we deal with the point that has been raised. It is, that there was no express consent to tax the costs of the appeal out of sessions. But there may be consent without there being express consent. Consent means the concurrence of two minds. This does not mean a concurrence expressed in words only. In many cases a man's consent is implied, and rightly implied, from his actions or merely from his silence. So here, it seems to be admitted that the universal practice is to tax out of court by consent. It appears that the leading counsel for the respondents knew so well that this was the practice that he wrote on his brief beforehand, when he saw that judgment must be against him, "Costs to be taxed out of sessions." No one suggests that this indorsement binds the respondents. But it shows that it was felt that this was the usual practice. We have also affidavits from the solicitors on the other side to the effect that it is so ; and it was doubtless for the same reason that counsel for the appellants did not think it necessary to say anything about it. But we are not without authority on the subject—I trust I should have had courage to decide the point if there had been none, for the ordinary business of litigation could not be carried on in the absence of an understanding between counsel. The view taken by Lush, J. in *Southampton Gaslight and Coke Company v. Southampton Union* (*ubi sup.*) supports me in my opinion. The facts in that case are doubtless different, but, even giving to what Lush, J. says the meaning contended for by the counsel for

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the respondents, it is clear that the true effect of the case is, that, in view of the regular custom to tax out of court, the consent of counsel might be implied. Then there is the further question as to the power of the Court of Quarter sessions to make the order as to the payment of costs, and also as to the subordinate amount of 16*l.*, the costs of the hearing at which the order was made. The respondents say the court had no jurisdiction to make an order relating to a previous session. I do not think there was any want of jurisdiction. The case of *Campbell v. The Queen* (11 Q. B. Rep. 799; 15 L. J. 76, M. C.) shows that in criminal matters the Court of Quarter Sessions is a continuing court. If the court had not power to make this order, is it to be said that, if a copying clerk in the clerk of the peace's office were to make a manifest error, there would be no opportunity of setting it right? It is argued for the respondents that in that case the party aggrieved might come to the Queen's Bench Division of the High Court for a *mandamus* to the clerk of the peace. But this court would have no jurisdiction to set the order aside if regular on the face of it, and a *mandamus* would not lie to the clerk of the peace. Is it then to be said that there is not power anywhere to rectify an error? I am of opinion that there is such power, that the Court of Quarter Sessions has power to make such necessary alteration in an order, and to say that there has been an error. So I have come to the conclusion that the order made at the January sessions was the order of the Midsummer sessions, and that it was not made in excess of jurisdiction, but properly made, and in my opinion the Court of Quarter Sessions was the only court to which an application could be made for an order to the clerk of the peace to tax.

WRIGHT, J.—I am of the same opinion for three reasons. First, because the Court of Quarter Sessions is a tribunal constituted by a commission of the peace which has itself a continuous existence. The court is required by the statutes to sit four times a year, but it is always the same court which sits. No doubt there are particular matters which, by the requirements of particular statutes, must be terminated at a particular session, but in other cases things are done at different sessions which are necessarily considered to be done by the same court. There is no such limitation to any particular sessions in the section (sect. 5 of 12 & 13 Vict. c. 45) giving the Court of Quarter Sessions discretion to order the payment of the costs of appeals. Here the court has simply carried out the intention of this section. It has made no fresh order, but has simply said at the January sessions what the order made at the previous Midsummer sessions was. I think we could not quash such an order; the High Court has no jurisdiction to quash an order of quarter sessions, made in accordance with practice and within their jurisdiction. My second ground is this: we are asked to quash this order on the ground that no consent was given that there should be taxation out of sessions. I think that, in taking such a course, we should

exercise our discretion wrongly and against good faith ; for I am of opinion that there was here a consent, though not an express consent, to tax out of sessions. Thirdly, though it is not necessary for us to decide the point, I must add that I share the doubt whether, when an order of quarter sessions comes up before us to be enforced, we can do anything except to see if it is wrong on the face of it. Power to go into the merits of such an order would, for one thing, interfere with the rules as to the time within which a writ of *certiorari* must be applied for.

Rule discharged.

Solicitors against the rule, *Beale and Co.*
Solicitor for the rule, *F. Shelton.*

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QUEEN'S BENCH DIVISION.

Saturday, Jan. 27, 1894.

(Before Lord COLERIDGE, C.J., and DAY, J.)

REG. v. HORACE SMITH, ESQ., AND THE AERATED BREAD
COMPANY. (a)

Summary jurisdiction—Statutory direction to provide and fix weights and scales in baker's shop—Absence of penalty—Proceedings for breach not cognisable in court of summary jurisdiction—3 Geo. 4, c. cvi., s. 8—6 & 7 Will. 4, c. 37, s. 6.

Sect. 8 of 3 Geo. 4, c. cvi. (and therefore sect. 6 of 6 & 7 Will. 4, c. 37, which is in the same terms), though directing that every baker, &c., shall fix in his shop proper weights and scales, &c., does not provide a penalty for the breach of this duty, which therefore does not constitute an offence cognisable by a court of summary jurisdiction.

THIS was a rule *nisi* calling upon Horace Smith, Esq., a metropolitan police magistrate, sitting at Clerkenwell, to show cause why a writ of *mandamus* should not issue to compel him to hear and determine a certain summons which had been taken out against the Aerated Bread Company. The charge made against the company was for not causing to be fixed in a certain shop of theirs, on or near the counter, a beam and scales, with proper weights, as provided by 3 Geo. 4, c. cvi., s. 8.

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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—Power of
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summary
jurisdiction
to entertain
proceedings—
3 Geo. 4,
c. cvi., s. 8;
7 Will. 4,
c. 37, s. 6.

The magistrate declined jurisdiction on the ground that, though the section enacted that every baker should fix such weights and scales, it provided no penalty for the breach of this direction.

Poland, Q.C. and *Courtenay Fooks* showed cause against the rule.—The statute does not provide any penalty for the offence charged here, and the magistrate was right in declining jurisdiction. The only remedy is by indictment. See *Stone's Justice's Manual* (27th edit., p. 177, note o); *Reg. v. Kingsley* (16 L. T. Rep. O. S. 408; 15 J. P. 65).

R. Isaacs in support of the rule.

LORD COLERIDGE, C.J.—I am of opinion that the learned magistrate was right in his view of this case. We cannot import into sect. 8 penalties for anything beyond the offences for which in terms they are provided, viz., "for every such false beam and scales and balance or false weight." There is no suggestion of such offences here, and it is enough to say that the statute means what it says. True, it says that scales are to be fixed, but it does not impose a penalty for non-compliance with that requirement, and the magistrate rightly declined jurisdiction to investigate a summons for such non-compliance.

DAY, J. concurred.

Rule discharged.

Solicitor for the prosecutors, the Master Bakers' Protection Society, *Arthur Ewes*.

Solicitors for the Aerated Bread Company, *Wilson, Bristowes, and Carpmael*.

QUEEN'S BENCH DIVISION.

Wednesday, Feb. 14.

(Before MATHEW and COLLINS, JJ.)

HIETT (app.) v. WARD (resp.) (a)

Adulteration—Milk—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 6 and 14—Sale of Food and Drugs Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 3—Amendment of summons—Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 1.

A consignor of milk having been summoned under sect. 6 of the

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

Sale of Food and Drugs Act, 1875, the evidence against him disclosed an offence under sect. 3 of the Amendment Act, 1879. Held, that the variance was curable by sect. 1 of the Summary Jurisdiction Act, 1848, and that the appellant was rightly convicted.

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THIS was an appeal by way of case stated from a decision of magistrates.

R. Neville for the appellant.—The summons alleges a purchaser, and the case finds a procurement as inspector, so that there is a material difference between the offence charged and that which has been proved. He also referred to *Rouch v. Hall* (44 L. T. Rep. N. S. 183: 6 Q. B. Div. 17).

Gore Browne for the respondent.—The variance is curable under sect. 1 of the Summary Jurisdiction Act, 1848.

MATHEW, J.—The only question here is that which arises with regard to the form of the summons, for there is a good old-fashioned variance between the offence charged in the summons and that which is proved by the evidence; but the Summary Jurisdiction Act was framed to get rid of this very difficulty. The magistrates find that no injury has been done to the appellant, and no application was made for adjournment; therefore they had jurisdiction to convict, and their decision, with which on the merits we agree, must be affirmed.

COLLINS, J. concurred.

Appeal dismissed.

Solicitor for the appellant, *Frank Ridley*.

Solicitor for the respondent, *Bevir, for Bevir, Wootton Bassett*.

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—Practice—
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10 & 11 Vict.
c. 43, s. 1;
38 & 39 Vict.
c. 63, ss. 6, 14;
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c. 30, s. 3.

QUEEN'S BENCH DIVISION.

Wednesday, March 7.

(Before *MATHEW* and *CAVE, JJ.*)

POLLOCK v. MOSES. (a)

Fishery Acts—Freshwater fishery—Water bailiff—Right to prosecute without the authority of board of conservators—Salmon Fisheries Act, 1861 (24 & 25 Vict. c. 109), s. 8—Fisheries Act, 1891 (54 & 55 Vict. c. 37), s. 13.

(a) Reported by *F. O. ROBINSON, Esq., Barrister-at-Law.*

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c. 109, s. 8;

54 & 55 Vict.

c. 37, s. 13.

The Fisheries Act, 1891, s. 13, provides that the powers conferred by the Fisheries Acts upon any authorities or officers to enforce them shall not limit or take away the power of any other person to take legal proceedings for their enforcement.

Held, that, under this section, a water bailiff can institute proceedings for an offence against the Fisheries Acts without being authorised so to do by the board of conservators of the district.

By sect. 13 of the Fisheries Act, 1891, Anderson v. Hamlin (63 L. T. Rep. N. S. 168; 25 Q. B. Div. 221) has ceased to be law.

SPECIAL CASE stated by justices of Cumberland.

The appellant was summoned for fishing for salmon with a "snatch" in the river Derwent, which is a fishery district subject to a board of conservators, contrary to sect. 3 of the Salmon Fishery Act, 1861. The respondent, upon whose information the complaint was laid, was a duly appointed water bailiff in the employment of the board of conservators for the district. The respondent admitted in cross-examination that he prosecuted in his capacity as water bailiff, but that he was not authorised by the board to institute the proceedings.

The justices convicted the appellant and inflicted a fine, subject to this case.

The question for the opinion of the court was, whether it was necessary that the respondent should have received express authority from the board of conservators to institute the proceedings.

The Salmon Fisheries Act, 1861, s. 8, enacts that:—

No person shall do the following things or any of them; that is to say, (2) use any spear, gaff, strikehall, snatch, or other like instrument for catching salmon; and any person acting in contravention of this section shall incur a penalty not exceeding 5*l.*, and shall forfeit any instruments used by him or found in his possession in contravention of this section; but this section shall not apply to any person using a gaff as auxiliary to angling with a rod or line.

The Fisheries Act, 1891, s. 13, enacts:—

The powers conferred by the Sea Fisheries Act, 1883, or this Act, or any other Act relating to salmon and freshwater fisheries upon any authorities or officers to enforce any such Act shall not be construed as limiting or taking away the power of any other person to take legal proceedings for the enforcement of any such Act or of any bye-law made thereunder.

Sylvain Mayer for the appellant.—The conviction was wrong. It was held in *Anderson v. Hamlin* (63 L. T. Rep. N. S. 168; 25 Q. B. Div. 221) that in the absence of express authority from the board of conservators a water bailiff could not institute proceedings against a person for fishing without a licence in a fishery district. That decision is not affected by sect. 13 of the Fisheries Act, 1891. The words "any other person" in that section were not intended to include a water bailiff, for the previous part of the section refers to the powers conferred by the Fisheries Acts upon any "authorities or officers," *i.e.*, a water bailiff acting upon instructions given to him by the board of conservators, and the section then goes on to enact that those powers shall not limit the right

of any other persons other than "authorities or officers" to institute proceedings.

Willis Bund, for the respondent, was not called upon.

MATHEW, J.—I am of opinion that this conviction was right, and that the appeal must therefore be dismissed. The case of *Anderson v. Hamlin* was decided in 1890, and the court there held that, before prosecuting for an offence against the Fisheries Acts, a water bailiff must have received authority from his board of conservators to do so. Then in 1891 the Fisheries Act is passed, sect. 13 of which provides that any person may take proceedings to enforce the Fisheries Acts. It is therefore no longer necessary for a water bailiff to obtain the authority of the conservators before instituting proceedings.

CAVE, J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellant, *Nicholson, Nicholson, and Graham*, for *Errington*, Carlisle.

Solicitor for the respondent, *T. Cuthbert Burn*, Cockermouth.

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c. 109, s. 8;
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c. 37, s. 13.

QUEEN'S BENCH DIVISION.

Wednesday, March 11, 1893.

(Before CAVE and MATHEW, JJ.)

REG. v. BRADLEY. (a)

Highway—Encroachment—Conviction—Defect—11 & 12 Vict. c. 43
—*Question of title—Certiorari—Highway Act, 1864 (27 & 28*
Vict. c. 101), s. 51.

By sect. 51 of the Highway Act, 1864, if any person shall encroach by making any fence on the side of any carriage-way, within fifteen feet of the centre thereof, he shall on conviction be liable to a penalty. The defendant was convicted under this section. The conviction did not state that the defendant had "encroached" on the highway.

A writ of certiorari having been granted in chambers in vacation, and a rule nisi to quash the conviction having been drawn up, on motion to make such rule absolute:

(a) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

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Held, that there was power to amend the conviction, if necessary, under 12 & 13 Vict. c. 45, s. 7, but that certiorari having been taken away by sect. 107 of the Highway Act, 1835, which Act by sect. 42 of the Highway Act, 1862, and sect. 2 of the Highway Act, 1864, is to be read as one with the Act of 1864, the omission of the word "encroach" did not render the conviction bad, and that certiorari would not lie for such a defect, and therefore the court would not quash the conviction on that ground.

Ex parte Bradlaugh (38 L. T. Rep. N. S. 680 ; 3 Q. B. Div. 509) considered.

The defendant, being charged with an offence under sect. 51 of the Highway Act, 1864, contended that he was the owner of the land on which a fence had been erected, and that it did not form part of the highway, and that the justices had no jurisdiction to adjudicate in the matter, on the ground that title to land came in question.

Held, that the justices had jurisdiction, the question for them being whether or not the land in question formed part of the highway. Rule nisi to quash the conviction accordingly discharged.

MOTION for rule absolute for an order to quash two convictions by justices.

The defendant was the secretary of a company called the Combined Estates Company, owning certain property at Hampton. A summons was issued against the defendant on the information of the surveyor to the local board for the district of Hampton, being the urban sanitary authority for the district, charging the defendant that he did, "contrary to sect. 51 of the Highways Act, 1864, cause a fence to be erected on the side of a carriage-way or cartway known as Hanworth-road, Hampton, being a public highway within the district of the Hampton Local Board, within fifteen feet of the centre thereof, and did thereby cause such carriage-way or cartway to be reduced in width to less than thirty feet between the fences on each side thereof."

The defendant was charged with a similar offence in connection with another highway called the Mill-road, Hampton, but the facts were practically the same in both cases.

At the hearing before the justices it was proved that the Combined Estates Company had been since 1879 the freeholders of the land adjoining one side of the Hanworth-road, which was a public highway. At the side of the road there was a ditch about two feet wide, uninclosed from the road. The servants of the company erected a fence upon the side of the road, and within fifteen feet of the centre, so as to inclose the ditch. The defendant claimed that the ditch was the property of the company, and had never formed part of the highway, and an objection was taken that the case involved a question of title, and that the jurisdiction of the justices was thereby ousted.

This objection was overruled. The local board did not dispute that the company, being the freeholders of the adjoining land, were also the owners of the soil of the ditch and of the land immediately adjoining the ditch, upon which the fence had been erected, but contended that the ditch and the land had always formed part of the highway. After hearing evidence on both sides the justices held that the offence had been proved, and imposed a penalty. The record of the conviction stated the offence in the same form as used in the information.

The defendant applied in Vacation to the judge in chambers for a summons to show cause why a writ of *certiorari* should not issue to bring up the conviction. On a return to the summons the judge ordered the writ to issue. Subsequently a rule *nisi* was drawn up under the Crown Office Rules, 1886, r. 257, to show cause why the conviction should not be quashed.

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The Highway Act, 1864, s. 51, enacts that :—

From and after the passing of this Act, if any person shall encroach by making or causing to be made any building, or pit, or hedge, ditch, or other fence, or by planting any dung, compost, or other materials for dressing land, or any rubbish, on the sides or side of any carriage-way or cartway within fifteen feet of the centre thereof, or by removing any soil or turf from the side or sides of any carriage-way or cartway except for the purpose of improving the road, and by order of the highway board, or where there is no highway board, of the surveyor, he shall be subject on conviction for every offence to any sum not exceeding forty shillings, notwithstanding that the whole space of fifteen feet from the centre of such carriage-way or cartway has not been maintained with stones or other material used in forming highways, and it shall be lawful for the justices assembled at petty sessions, upon proof made to them upon oath, to levy the expenses of taking down such building, hedge, or fence, or filling up such ditch or pit, or removing such dung, compost, materials, or rubbish as aforesaid, or restoring the injury caused by the removal of such soil or turf upon the person offending. Provided always that, where any carriage-way or cartway is fenced on both sides, no encroachment as aforesaid shall be allowed whereby such carriage-way or cartway shall be reduced in width to less than thirty feet between the fences.

Bosanquet, Q.C. and *H. Terrell* in support of the rule *nisi*.— Although by sect. 107 of the Highway Act, 1835 (with which the Highway Act, 1864, is to be read as one), *certiorari* has been taken away, it will still lie if it can be shown that the justices had no jurisdiction to act. They had no jurisdiction to make an order in this case, first, because, in order to constitute an offence under sect. 51 of the Highway Act, 1864, it must be proved that the defendant encroached on the highway by placing a fence or other obstacle thereon. There is no such finding by the justices in this case. The conviction, which follows the form of the information, merely states that the defendant did unlawfully cause a fence to be erected, &c. It is therefore bad and ought to be quashed : (*Reg. v. Bolton*, 1 Q. B. 66 ; *Ex parte Bradlaugh*, 38 L. T. Rep. N. S. 680 ; 3 Q. B. Div. 509.) Secondly, the jurisdiction of the justices was ousted because a question of title to land was involved. The defendant has not encroached on the highway at all, but has inclosed a ditch which was his own property, and which has never formed, and could not form, part of the carriageway or cartway. The same question arose in *Field v. Thorne* (20 L. T. Rep. N. S. 563), where the court held that the

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erection of a fence upon the side of an open ditch which was within fifteen feet of the centre of the carriageway was not an encroachment. *Easton v. Richmond Highway Board* (25 L. T. Rep. N. S. 586; L. Rep. 7 Q. B. 69); *Evans v. Oakley* (1 Car. & Kir. 125) were also referred to.

Channell, Q.C. and *H. Courthope-Munroe*, for the local board, were not called upon.

MATHEW, J.—We are not called upon to say, and ought not to say, whether the magistrates were right or wrong in their decision in this case. The sole question for us to decide is, whether they had any jurisdiction, because by the Highway Act, 1835, *certiorari* has been taken away. Now, was there any point upon which it can be shown that the magistrates were bound to hold their hands? The matter came properly before them under sect. 51 of the Highway Act, 1864. The matter having come before them, and there being no objection to the form of the information, they were bound to hear the evidence. They did hear the evidence on both sides, and they came to the conclusion that an offence had been committed within the meaning of the Act. They may have come to a wrong conclusion, but that does not show that they had no jurisdiction. Although this court has no jurisdiction to say whether or not the decision of the magistrates was right, nevertheless I think that it is only proper, having looked through the evidence, to express my opinion extra-judicially, that the magistrates were perfectly right in the decision to which they came. They were quite justified in regarding this ditch as dedicated to the public and as part of the highway. The fence unquestionably is an encroachment upon ground over which the public have a right.

CAVE, J.—I am of the same opinion. To my mind, this is an extremely clear case upon the subject of magisterial jurisdiction, which is a subject not apparently thoroughly understood, and upon which there are a good many fallacies which can be urged and which have been urged before us to-day. According to the law as it originally stood, the Court of Queen's Bench had a jurisdiction over magistrates, not by way of appeal on the merits, but by way of seeing whether the proceedings were correct in form. Orders of magistrates were brought up before the court by *certiorari*, and the court proceeded to examine into the form of the order or conviction in order to see if it was correct in point of form. The court held that all the circumstances which were necessary to warrant the conviction or order must be set out on the face of the order or conviction, and that included, where there was not a statutory form of conviction or order, a statement of all the points which the magistrate had to go through in order to arrive at such conviction or order. The consequence was, that the court had to exercise an indirect kind of jurisdiction over almost every order made or conviction by a magistrate. That became so burdensome that the Legislature interfered, and did so in two ways. One way was by taking away the *certiorari* alto-

gether, and that put an end to all questions whether or not the order or conviction was right in point of form. The other way was by framing a statutory form of conviction, and by providing that, if the order or conviction was in the statutory form, it was to be taken to be perfectly good. By one or other of these ways the jurisdiction of this court in these matters has been almost put an end to, but attempts are sometimes made to bring it into force again, and that is done by means of the suggestion that the magistrates have exceeded their jurisdiction, because it has been held that a statutory provision taking away *certiorari* does not apply where there has been an excess of jurisdiction on the part of the magistrate, and that may be shown (*alunde*) by affidavit, although it may not appear on the face of the conviction or order. Excess of jurisdiction may either exist at the time when the summons comes on to be heard, and in that case there is no jurisdiction to hear the case at all, or it may in some cases crop up in the course of the hearing, as, for example, where the question of title to land comes in question, and in such a case the jurisdiction of the magistrates is ousted. Whenever either of these two things happens, if the magistrates proceed to hear and determine the case, their decision must be brought up by *certiorari* for the purpose of being quashed as being in excess of jurisdiction. A good deal of misconception prevails as to what is and what is not excess of jurisdiction. If the magistrates have no jurisdiction they cannot proceed with the case, either to convict or to acquit; they have no jurisdiction to do either; they must stop short. That is the meaning of the expression want of jurisdiction, and that is what is meant by saying that magistrates have exceeded their jurisdiction. In this case it is clear that there was never a point at which the magistrates were bound to stop. The summons was taken out under sect. 51 of the Highway Act of 1864. If there was any objection to it in point of form, the objection ought to have been made before the magistrates, and they would have dealt with it. That is provided for in Jervis' Act (11 & 12 Vict. c. 43). If the magistrates think that a mistake in form has in any way misled or embarrassed the defendant, the magistrates will allow the case to be adjourned, in order that the defendant may not be damnified. But where the defendant has not been misled the magistrates will rightly refuse to attach any importance to a technical objection upon the ground of form, and in so doing they are acting within their jurisdiction, and this court has no power to interfere. This case was therefore properly heard by the magistrates. They had evidence given by both sides as to whether this strip of land was or was not part of the highway, and having heard the evidence, were they bound to hold their hands and say that it was a matter with which they could not deal? Certainly not. It was the very thing which they were bound to decide. In the case of *Williams v. Adams* (5 L. T. Rep. N. S. 790) the court held that the magistrates were intended to decide in a case such as this whether

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or not the piece of land inclosed was a highway, and that the jurisdiction of the magistrates was not ousted by the defendant's claiming the land as owner of the freehold. The magistrates were bound to give their decision, and it is therefore impossible to say that they had no jurisdiction. Having jurisdiction, they are bound to exercise it. One test for ascertaining whether a matter is within the jurisdiction of magistrates or not is to consider the nature of the arguments used against the magistrates. If there was no jurisdiction, the magistrates ought not to have decided the case at all; but, if the contention is that the magistrates ought to have come to a different decision on the merits, it is quite clear that they had jurisdiction. Only one case of modern times has been relied on by the appellants, that is *Ex parte Bradlaugh* (38 L. T. Rep. N. S. 680; 3 Q. B. Div. 509). Now, to my mind it is clear that the conclusion to which I have referred did take place in that case. In the first place, it was admitted that the *certiorari* was taken away; and, secondly, no objection could be made to that order except on the ground of want of jurisdiction. It was said that there was a want of jurisdiction. How? Because it was said that the order for the destruction of the books did not contain a recital that the magistrate came to the conclusion that the publication of them was a misdemeanour which was to be prosecuted. But there was no evidence that the magistrate did not come to that decision in that case. The fact that it was not recited in the order does not prove that the magistrate did not come to that conclusion; and if he did come to that conclusion, then his order was perfectly right and he had jurisdiction to make it. If he did not come to the conclusion that the publication was a misdemeanour he would not thereby be deprived of jurisdiction; he would still have a jurisdiction, but he would be bound to decide in favour of the defendant and dismiss the summons. Where a magistrate decides one way when he ought to have decided another way, that is not absence of jurisdiction. Absence of jurisdiction only arises when he has no power to decide in the matter at all. On these grounds it is quite clear that the *certiorari* having been taken away here the conviction cannot be dealt with by this court. The magistrates had jurisdiction, and consequently the rule must be discharged. I agree with what Mathew, J. has said with reference to the finding of the magistrates on the facts proved before them.

Rule nisi discharged with costs and the costs of the certiorari.

Solicitors for the defendant, *Rooke and Sons*.

Solicitors for the Hampton Local Board, *Kent and Son*.

QUEEN'S BENCH DIVISION.

Monday, Dec. 4, 1893.

(Before Lord COLERIDGE, C.J. and COLLINS, J.)

COCKS (app.) v. MAYNER (resp.). (a)

Hackney carriage—Omnibus—Licence—"Plying for hire"—No charge for carriage of passengers—Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 45—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171—Towns Police Clauses Act, 1889 (52 & 53 Vict. c. 14), s. 4.

Sect. 45 of the Towns Police Clauses Act, 1847, incorporated in the Public Health Act, 1875, provides that if the proprietor of any carriage permits the same to be used as a hackney carriage plying for hire within a prescribed distance without obtaining a licence he shall be liable to a penalty. By sect. 4 of the Towns Police Clauses Act of 1889, "hackney carriage" is to include an omnibus.

Two ordinary omnibuses were run in the following way: It was intimated by several notices upon the omnibuses that the omnibuses were placed at the disposal of the public free of charge, and also notices stating that voluntary contributions to support the omnibuses would be welcomed. There was a conductor on each of the omnibuses to supply change. Many persons using the omnibuses placed money in the boxes, but some did not.

The magistrates, upon an information laid before them, held that this was not a "plying for hire" within the meaning of the statute under which the proceedings were taken.

Held, that this was an attempt to evade the statute, that there was a "plying for hire" within the meaning of the statute, and that the case must be remitted to the magistrates to rehear and convict.

THIS was an appeal from the magistrates by a special case as follows:

1. A case was stated by three of the justices for the county of Sussex acting for the Petty Sessional Division of Hove under the statutes 20 & 21 Vict. c. 43, and the Acts amending the same.

2. At a petty sessions holden at Hove, in the county of Sussex, an information was preferred by the appellant against the respondent, under sect. 45 of the Towns Police Clauses Act, 1847,

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

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charging that the respondent had in the town and district of Hove in the said county, being the proprietors of a certain carriage (to wit), an omnibus, permitted the same to be used as a hackney carriage plying for hire within the town and district of Hove aforesaid without having previously obtained a licence for such carriage. The said information and complaint was heard and determined.

3. The appellant being dissatisfied with our determination upon the hearing of the said information as being erroneous in point of law, pursuant to sect. 2 of the said statute 20 & 21 Vict. c. 43, duly applied to us in writing to state and sign a case setting forth the facts and the grounds of such determination as aforesaid for the opinion of the High Court.

4. (a) Sect. 45 of the Towns Police Clauses Act, 1847, which is incorporated with the Public Health Act, 1875, and is in force in the district hereinafter referred to, provides that, "If the proprietor or part proprietor of any carriage, or any person so concerned as aforesaid, permits the same to be used as a hackney carriage plying for hire within the prescribed distance without having obtained a licence as aforesaid for such carriage," he shall be liable to a penalty not exceeding 40s. (b) By sect. 51 of the Hove Commissioners Act, 1873, it is provided that the prescribed distance shall be the limits of the district—that is, the town of Hove. (c) Under the provisions of sect. 38 of the Towns Police Clauses Act, 1847, and sect. 11 of the Hove Commissioners Act, 1877, and sect. 4 of the Towns Police Clauses Act, 1889, the meaning of the word hackney carriage is extended to include an omnibus. (d) It was proved that the respondent applied to the Hove Commissioners for licences for three omnibuses to ply for hire within the said district, and report of the police committee of the Hove Commissioners was put in. (e) On the 10th day of July the respondent commenced to run an omnibus over the route mentioned in his application—that was, along the main thoroughfare of the town of Hove. (f) The two omnibuses so run by the respondent were two of the vehicles for which he had sought to obtain licences, and were ordinary omnibuses used for street traffic. The respondent's name as proprietor was painted both on the near and off side of each omnibus. The omnibuses were painted white, and their starting point and destination, and the names of various places on the said route were painted in conspicuous positions upon them. There were two horses and a driver and conductor to each omnibus. (g) These two omnibuses passed with regularity from Osbourne-street, Hove, to Queen's-square, Brighton, and back. Passengers were carried and taken up and set down again when and where requested along the said route (a large part of which is within the Hove district), and the said two omnibuses were extensively made use of by the public along the said route. (h) Except as hereinafter mentioned, the said two omnibuses seek custom and carry passengers along the said route in the ordinary way. (i) On an advertise-

ment board on each side of the omnibus the following words were printed on a card: "The buses are placed at the disposal of the public free of charge; any voluntary contributions towards their maintenance will be welcomed." Similar notices were placed inside the omnibus. At the top of the stairs leading to the roof of the omnibus there was a box with glass sides for the reception of money, and on each of the glass sides was printed the words "Voluntary contributions." There were other notices upon the omnibuses relating to the same, and the number of persons that the omnibus would hold was also printed. (j) The said omnibuses were seen passing along the route, and using the stands in the roads which are used for hackney carriages. (k) It was proved that passengers did ride on the omnibuses without putting any money in the boxes. It was not proved that the respondents had ever been heard to remonstrate with any passenger for not putting any money into the collecting boxes. (l) It was proved that the respondents refused to allow certain persons to ride on the omnibus. (m) One of the conductors admitted that he offered the passengers change in order that they might put money into the collecting boxes, and he admitted that the passengers could see what was put into the boxes by other passengers, and that they did generally pay money into the boxes placed for that purpose in the omnibuses, &c. (n) It was contended for the respondent that the respondent's omnibuses were not plying for hire because the passengers carried by him were under no legal liability to make any payment to the respondent for the use of his omnibus; and it was contended for the appellant that the respondent was seeking the custom of passengers, whom he carried on his omnibus for a consideration, and that he was in law permitting his omnibus to ply for hire within the said district. (o) Upon these facts the magistrates held that the term "hire" implied a contract under which a liability arises to pay a sum of money legally recoverable for the use of the thing hired, or for services rendered, and that the evidence in this case fails to establish any such legal liability on the part of the persons using this omnibus, and for the above reason the magistrates held that the defendant was not permitting the said omnibus to ply for hire under the Towns Police Clauses Act, 1847, and therefore dismissed the information and complaint.

The questions of law arising in the above statement for the opinion of the higher court are: 1. Whether, in order to prove a plying for hire within sect. 45 of the Towns Police Clauses Act, 1847, it is necessary to prove a contract, or an attempt to enter into a contract, for the use of the thing hired, or for services rendered, under which a sum of money is legally recoverable. 2. Whether, upon the facts above set forth, the respondent did in law permit his said omnibus to ply for hire within the said district.

If the High Court should be of opinion that the said order

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dismissing the said information and complaint was legally and properly made, and that the respondent did not in law permit his said omnibus to ply for hire within the said district, then the said order is to stand; but if the court shall be of the contrary opinion, then the court is solicited, according to 20 & 21 Vict. c. 43, to remit the case to the magistrates with the opinion of the court thereon, or to make such other order as to the court may seem fit.

Boxall (with him *Finlay*, Q.C.) for the appellant.—The magistrates were wrong in not convicting the respondent. The act of the respondent in running these omnibuses as the respondent did was clearly an act which brought him within the 45th section of the Towns Police Clauses Act, 1847. Although the respondent purported to run these omnibuses free of charge, he nevertheless was willing to receive money, and did so receive it. There was a sufficient plying for hire to bring the respondent within the meaning of the Act, which provides that, if the proprietor of any carriage permits the same to be used as a hackney carriage "plying for hire" within a prescribed distance without obtaining a licence, he shall be liable to a penalty. The definition of the word "hire," taken from Wharton's Law Lexicon, is stated to be "a bailment for reward or compensation." This was so here, and I submit, therefore, that the respondent has brought himself within the meaning of the 45th section, and this was an attempt to evade the provisions of the Act.

Winch, Q.C. and *F. C. Gore* for the respondent.—There was no "plying for hire" here to bring the case within sect. 45. The passengers who used these omnibuses contracted no debt of a legal character; the debt incurred was merely a debt of honour. A hackney carriage, whilst on the premises of a railway company by the leave of the railway company, is not "plying for hire" in any "street or place" within the meaning of the Hackney Carriage Acts. This was decided in *Case v. Storey* (20 L. T. Rep. N. S. 618; 38 L. J. 113, M. C., and 168, Ex.; L. Rep. 4 Ex. 319). There was no fixed rate of charge; in fact, there was no charge at all made. What was received was a mere voluntary contribution. [Lord COLERIDGE, C.J.—Is it less a "hire" because the hire is voluntary?] *Storey* on Bailments, 9th edition, paragraph 368, gives the following definition: A bailment for hire is a contract "whereby the use of a thing, or services and labour of a person, are stipulated to be given for a certain reward."

Lord COLERIDGE, C.J.—Everything that could have been said has been said on behalf of the respondent, but what has taken place has been an attempt to evade the statute. There has undoubtedly been a plying for hire by the respondent. The respondent says as much as this: "I will place my omnibuses at the disposal of the public if they will put into the boxes provided their money." The object of the sections of the Acts of Parlia-

ment which have been cited, and which apply in this case, is to give a control to the local authorities over public carriages which ply for hire. These omnibuses were plying for hire. The appellant was right in laying this information, and his appeal must be allowed, and this case must be remitted to the magistrates to rehear and convict.

COLLINS, J.—I am of the same opinion.

Appeal allowed.

Solicitors: for the appellant, *Harwood*, for *O. A. Woolley*, Town Clerk of Hove; for the respondent, *Snell, Son, and Greenip*, for *Lamb and Gates*, Brighton.

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Hackney carriage—Omnibus—Plying for hire—Free conveyance—Voluntary contributions—Towns Police Clauses Acts, 1847 and 1889—10 & 11 Vict. c. 89, s. 45; 52 & 53 Vict. c. 14, s. 4; Public Health Act, 1875, 38 & 39 Vict. c. 55, s. 171.

QUEEN'S BENCH DIVISION.

Monday, Dec. 4, 1893.

(Before Lord COLERIDGE, C.J. and COLLINS, J.)

BOND (app.) v. PLUMB (resp.) (a)

Gaming and betting—Place kept or used for purposes of—Conviction—Stakes not deposited—Preamble of Act—Act for the Suppression of Betting Houses 1853 (16 & 17 Vict. c. 119), ss. 1 and 3.

Sect. 1 of the Act for the Suppression of Betting Houses, 1853 (16 & 17 Vict. c. 119), provides that "no office, room, or other place shall be open, kept, or used for the purposes of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business there of betting with persons resorting thereto, or for the purpose of any money or valuable thing being received by or on behalf of such owner, &c., as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express, or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race or other race, fight, game, sport, &c., as aforesaid, and every house, office, room, or other place opened, kept, or used for the purposes

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aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law." Sect. 3 provides for the penalty for such offence as aforesaid if committed.

An information was laid before the magistrates charging the appellant under the above sections with keeping a room (he being the occupier) for the purpose of betting with persons resorting thereto, and the magistrates so found; but it was not shown that the appellant kept the room for the purpose of receiving deposits on bets.

Held, that sect. 1 creates two separate and distinct offences: first, keeping a house, office, room, or other place for the purpose of betting with persons resorting thereto; and, secondly, keeping, a house, office, room, or other place for the purpose of receiving deposits on bets.

THIS was a case stated by the magistrates.

An information was laid charging the appellant that he, being the occupier of a certain office or room in a certain house, unlawfully did open and keep the said office for the purpose of betting with persons resorting thereto upon certain events and contingencies of and relating to horse-races, contrary to the form of the statute.

The proceedings were taken under and by virtue of the first part of sect. 1, and under sect. 3 of the Act for the Suppression of Betting Houses 1853 (16 & 17 Vict. c. 119).

The following facts were proved before the magistrates:—

That the appellant had issued and published an advertisement as follows:

W. Bond and Co., turf accountants, 6, Colonnade-gardens, Eastbourne.—The Derby, Oaks, Ascot Stakes, and all future events. Terms on application. Business personally conducted.—Telegraph address "Common," Eastbourne.

In consequence thereof, betting had taken place with the appellant, or with some person procured by him, at the said premises, and certain telegrams and letters had been received by the appellant at the premises from persons making bets on certain horse-races with the appellant and persons procured by him, and having reference to betting transactions, and requesting that certain stakes should be made, the settlement of which should depend upon the result of horse-races.

Similar papers were found upon the premises, and also books having reference to betting transactions.

On behalf of the appellant it was contended that the words of the first portion of sect. 1 of the Betting Houses Act, 1853 (16 & 17 Vict. c. 119), did not constitute an offence, and consequently that none was disclosed by the information; and that only an offence was constituted by the whole of the section, whereas the information had been laid under the first portion of it only.

The magistrates were of opinion that the room had been kept

by the appellant for the purpose of the occupier (being the appellant) using the same for betting with persons resorting thereto; and that this was an offence within the meaning of the first portion of sect. 1, and convicted the appellant.

The question for the opinion of the High Court was: Does the first portion of the section (sect. 1) constitute an offence, and was it sufficient that the justices should have been satisfied (as they were) that the room was kept for the purpose of the appellant betting with persons resorting thereto?

The following is the preamble and the two sections of the Act for the Suppression of Betting Houses (16 & 17 Vict. c. 119) referred to.

The preamble says:

Whereas a kind of gaming has of late sprung up, tending to the injury and demoralisation of improvident persons by the opening of places called betting houses or offices, and the receiving of money in advance, by the owners or occupiers of such houses, or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse-races, &c.

Sect. 1 says:

No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or of any person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto, or for the purpose of any money or valuable thing being received by or on behalf of such owner, &c., as aforesaid, as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race, fight, game, sport, &c., as aforesaid, and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance, and contrary to law.

Sect. 3 provides for the penalty for such offence as aforesaid, if committed.

A second case was stated by the magistrates, upon an information under the second part of sect. 1, viz., being such house, room, or other place for the purpose of receiving deposits on bets—the magistrates found “that it was a condition of business that cover should be deposited for the business that was done—namely, that the money should be actually received before the bet was made.” This finding was considered to bring the case clearly within the exact words of the section. The magistrates having convicted, the court affirmed their conviction. Both cases were taken together.

Dale Hart for the appellant.—This conviction was wrong, because it is not shown that any deposit was received by the appellant. The preamble of the Betting Houses Act, 1853, shows that the gaming sought to be prohibited by the Act was the gaming “by the opening of places called betting houses or offices,” and the preamble goes on to say, “and the receiving of money in advance by the owners or occupiers of such houses or offices, &c.” And sect. 1 of the Act does not go any further than what the preamble says. The offence is not merely the keeping open of a room or office for the purpose of betting, but

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there must be also the receiving of a deposit by the owners or occupiers of such room or office. Here there was no evidence of any such deposit having been made. In the case of *Bows v. Fenwick* (30 L. T. Rep. N. S. 524; 9 C. P. 339; 43 L. J. 107, M. C. 160, C. P.), Brett, J., after referring to the preamble of this Act, says, on p. 526 (L. T. Rep.): "The kind of betting there described it (the Legislature) had determined ought to be suppressed, and the first section shows against what sort of proceeding the Act is directed, viz., the opening of places for betting purposes, with persons resorting thereto." The judgments of Lush, J. in *Haigh* (app.) v. *The Town Council of Sheffield* (resps.) (31 L. T. Rep. N. S. 536; 10 Q. B. 102; 44 L. J. 17, M. C., and 333, Q. B.), and of Hawkins, J., in *Reg. v. Cooke* (51 L. T. Rep. N. S. 21; 13 Q. B. Div. 377), show that the Betting Houses Act is not aimed at betting and gaming generally, but at a particular kind of betting. There is, however, no decision directly in point. Blackburn, J. said, in *Haigh* (app.) v. *The Town Council of Sheffield* (resps.) (*ubi sup.*), on p. 538 (L. T. Rep.): "While it is quite plain that the latter part of sect. 1 is confined to the kind of betting mentioned in the preamble, I think it is not so clear that the first part of the section may not extend further," but Blackburn, J. does not decide the point, and in all the cases the receipt of a deposit has been proved. The question is not affected by the preamble of the Betting Houses Act, 1853 (16 & 17 Vict. c. 119), being repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19), for that repeal was only for the purpose of convenience, and was not intended to alter the effect of the statute. The preamble of the Act for the Suppression of Betting Houses, although no doubt repealed, may still be looked at for the purpose of the construction of that statute. In Coke's Institutes, part 4, c. 74, on p. 330, it is stated that "the preamble is to be considered, for it is the key to open the meaning of the makers of the Act, and mischiefs which they intend to remedy."

Boxall for the respondent.—Sect. 1 is disjunctive, and deals with two separate and distinct offences. First, opening, keeping or using houses, &c., for the purpose of betting with persons resorting thereto; secondly, using such places for the purpose of receiving deposits on bets. [He was stopped by the court.]

Lord COLERIDGE, C.J.—The preamble of the Act for the suppression of betting-houses is as follows: [Reads it.] These words clearly point to two separate and distinct evils, which it was the object of the Legislature to suppress: first, the opening of betting-houses; secondly, the receiving of money in advance. I will assume that sect. 1 of the Act does not go beyond the preamble, though, if it did, I am clear that the words of the section ought to prevail. But sect. 1 of the Act, as well as the preamble, deals with separate offences, and, as has been pointed out by Mr. Boxall, is a disjunctive provision. The first part of the section, which corresponds with the first part of the preamble

prohibits the opening, keeping, or using of any house, office, room, or other place for the purpose of the owner, occupier, keeper, &c., or any person using the same, &c., betting with persons resorting thereto; and in the second part of the section, which corresponds with the second part of the preamble, continues: "or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration of any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race or other race, &c. Therefore, the two parts of the section, as well as the two parts of the preamble, deal with separate and distinct offences. I do not think I need go into all the cases on the subject, for Mr. Hart has frankly admitted that the point is left open by the decisions. I think the passage which has been cited from the judgment of Brett, J. in *Bows v. Fenwick* (30 L. T. Rep. N. S. 524; 9 C. P. 339; 43 L. J. 107, M. C. 160, C. P.) is not so important with regard to the point now raised as it appears to have been considered in *Haigh* (app.) v. *The Town Council of Sheffield* (resps.) (31 L. T. Rep. N. S. 536; 10 Q. B. 102; 44 L. J. 17, M. C. and 333 Q. B.), for in the latter case Blackburn, J. appears to have thought that *Bows v. Fenwick* (*ubi sup.*) was a case on this point, but it was not so, for the whole judgment turned on the question whether the appellant was using a "place" within the meaning of the Act. The receipt of money was proved and was not in dispute, and therefore the contention now raised was not available in that case, and the court had not the point to decide. For these reasons I am of opinion that the appellant was rightly convicted.

COLLINS, J. concurred.

Judgment for the respondent.

Solicitor for the appellant, *F. Lawson Lewis*, Eastbourne, Sussex.

Solicitors for the respondent, *Sharpe, Parker, Pritchard*, and *Barham*, for *H. W. Fovargus*, Town Clerk of Eastbourne, Sussex.

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QUEEN'S BENCH DIVISION.

Monday, Nov. 13, 1893.

(Before WRIGHT and KENNEDY, JJ.)

REG. v. LUSHINGTON, Esq. (Metropolitan Police Magistrate);
Ex parte OTTO. (a)

Extradition warrant—Alleged stolen articles produced by purchaser of them under subpœna duces tecum—Power of magistrate to retain articles to send abroad—Application for rule under 11 & 12 Vict. c. 44, s. 5, for delivery up of articles—Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 9—Extradition Amendment Act, 1873 (36 & 37 Vict. c. 60)—Extradition Treaty with France, 1874.

Upon an application to a magistrate for the extradition of a fugitive criminal upon a charge of stealing certain articles in France a purchaser of the articles in England produced under a subpœna duces tecum before the magistrate the articles alleged to have been stolen in France. The police magistrate, after committing the accused to prison to await the Secretary of State's warrant for his extradition, directed the articles to be retained by the police for the purposes of the prosecution, but made no order. Sect. 9 of the Extradition Treaty, 1870, (33 & 34 Vict. c. 52), says: "When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England." The person who produced the articles under the subpœna applied under 11 & 12 Vict. c. 44, s. 5, for an order directing the police magistrate to order the articles to be delivered to him.

Held, that under 11 & 12 Vict. c. 44, s. 5, the High Court had no jurisdiction to make the order asked for, the section only enabling the court to order the police magistrate to perform his duty. He was *functus officio* as soon as the person accused was committed.

Held, further, that, assuming there was jurisdiction to make the order, the purchaser's possessory title (if any) to the articles had lawfully passed out of his possession under the subpœna duces tecum, and therefore the purchaser of these articles was not entitled to the relief asked.

THIS was an application under 11 & 12 Vict. c. 44, s. 5, for a rule nisi calling on a metropolitan police magistrate to

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

show cause why he should not make an order for the delivery up of certain articles to the applicant, produced by him on the hearing of certain proceedings for the extradition of one Emil Ebstein.

From the affidavits it appeared that a theft of jewellery and other articles had been committed in France, and that Ebstein was arrested in England on suspicion of having been concerned in the robbery.

Some of the jewellery was discovered to be in the possession of the applicant, who had an office in the city of London, and who stated that he had bought the articles for 50*l.* from Ebstein, and produced Ebstein's receipt for the same.

Upon the hearing before the magistrate for Ebstein's extradition, the applicant produced under a *subpœna duces tecum* the articles sold to him, and which were identified by the prosecutrix.

Ebstein was committed by the magistrate to await a warrant for his surrender to take his trial in France upon the charge of theft, and the police magistrate told a police officer in the court that he had better take charge of the articles of jewellery produced by the applicant, in order that they might be produced upon the trial of Ebstein in France, but the police magistrate made no order to that effect.

He further stated that the right to the property in the goods was entirely unaffected by his direction, and was fully reserved to all parties. The police magistrate, in giving this direction, considered that he had jurisdiction to do so under sect. 9 of the Extradition Act 1870 (33 & 34 Vict. c. 52).

A rule *nisi* was obtained by the applicant to bring up the learned police magistrate's order by *certiorari* for the purpose of its being quashed, but that rule was turned into the present one when it was discovered that no order in writing had been drawn up by the police magistrate.

Sect. 5 of 11 & 12 Vict. c. 44, enacts that,

In all cases where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office as such justice or justices, it shall be lawful for the party requiring such act to be done to apply to Her Majesty's Court of Queen's Bench, upon an affidavit of the facts, for a rule calling upon such justice or justices, and also the party to be affected by such act, to show cause why such act should not be done; and if after due service of such rule good cause shall not be shown against it, the said court may make the same absolute, with or without or upon payment of costs, as to them shall seem meet; and the said justice or justices upon being served with such rule absolute shall obey the same, and shall do the act required; and no action or proceeding whatsoever shall be commenced or prosecuted against such justice or justices for having obeyed such rule and done such act so thereby required as aforesaid.

Sect. 9 of the Extradition Act, 1870 (33 & 34 Vict. c. 62) enacts that,

When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England.

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The *Attorney-General* (Sir Charles Russell, Q.C.), the *Solicitor-General* (Sir John Rigby, Q.C.), and *H. Sutton*, for the metropolitan police magistrate, showed cause against the rule obtained.

—The present application on which this rule has been obtained is not to quash the learned magistrate's order, but to direct him to hand over these alleged stolen articles to the applicant.

There is no authority to show that the magistrate can be ordered to direct these articles to be given to any particular person.

There is no direct authority to show that the police are allowed to retain in their custody articles required for the purpose of criminal justice, but it is the invariable custom for them to do so.

There is very little authority to show that the magistrates have or have not jurisdiction to order articles to be either handed over or detained. *Davis v. Roe* (10 J. P. 385) decided (28th day of June, 1846) that an unwritten order by a magistrate for impounding goods in order that they may be produced in evidence is good; and in *Reg. v. Olifford* (1 C. & P. 521), which decided (30th day of Nov., 1824) that a judge at the trial of a case cannot order any paper to be impounded which is not given in evidence, even if it be in court in the possession of a witness. Abbott, C.J. in that case said that if it be in evidence he could order it to be detained. These articles were in evidence, so that the learned magistrate had jurisdiction to make an order for the detention of these goods. The applicant never had more than a possessory title to these articles, and when he produced them before the magistrate under the *subpoena duces tecum*, he became lawfully divested of the articles.

Edward Turner on behalf of the applicant in support of the rule.—The only order the learned police magistrate could make was for the mere detention of these articles by the police; he could make no order for their production in France, because the Extradition Act, 1870, gives him jurisdiction only as to the surrender of fugitive criminals, and no jurisdiction over goods or articles. After the magistrate has committed the fugitive criminal to prison he becomes *functus officio*. Every other proceeding is then taken by the Secretary of State. Under art. 14 of the Extradition Treaty between France and this country, dated the 14th day of August, 1876, which relates to the delivery up of property in the possession of fugitive criminals, only the Secretary of State can act, and not the police magistrate. Sect. 5 of the Extradition Amendment Act, 1873 (amending the Act of 1870) merely provides power for the magistrates, by an order of the Secretary of State, to take evidence in the absence of the person charged. These articles having been produced before the police magistrate under a *subpoena duces tecum* are virtually in possession of the police magistrate, and therefore this court can make an order upon the magistrate to deliver them up to the applicant. If the magistrate had drawn up a written order it could have been brought here and the Court could have been asked to quash it; but, as the magistrate has

drawn up no order in writing, all that can be done is to ask the Court to make absolute the rule obtained under 11 & 12 Vict. c. 44, s. 5.

WRIGHT, J.—I am of opinion that this rule must be discharged. In the first instance an application was made for a rule *nisi* for a *certiorari* to quash a supposed order of the learned police magistrate directing in substance that the jewellery in question should be retained for the purposes of the subsequent prosecution in France of a person he was committing for trial under the Extradition Acts. That order was not drawn up, and the form, therefore, of the rule was altered. The question before us is whether we ought to make an order on the learned magistrate requiring him to direct the delivery of this jewellery to the applicant, which was produced by the applicant at the police court under a *subpœna duces tecum*. It is not immaterial to observe that when this jewellery passed out of the applicant's hands, it passed out of his possession by virtue of the process of the court, and he became divested of it. Consequent upon that, what was the position of things? In this country I take it that it is undoubted law that it is in the power of and it is the duty of constables to retain for use in court whatever articles may be evidence of crime which have come into their possession without wrong on their part. It is undoubted law that when articles have once been produced in court by witnesses it is right and necessary for the court, or the constable in charge of them (as is generally the case) to preserve and retain them, so that they may be always available for the purposes of justice until the trial is ended. There is a great deal to be said for the proposition of the Attorney-General that when you find the preliminary stages of an investigation applied, not for the purpose of trial in this country, but for the purposes of trial abroad under the Extradition Acts, the magistrate here shall have similar powers with reference to the commitment under the Extradition Act as he would have with reference to commitment for trial in this country, and in some cases, at any rate, he would have power to preserve evidence for the use of the foreign tribunal. I cannot help thinking that there may be cases in which the court here would hold a magistrate justified in handing over evidence without which the Extradition Act would be futile in its application to the particular case; but it is not necessary to decide that in this instance, and I prefer not to express any positive opinion about it. But, however this may be, the application which is now made to us cannot succeed. Firstly, I very much doubt if this is the kind of matter to which 11 & 12 Vict. c. 44, s. 5, applies. I do not think that the section was intended to authorise persons having private grievances of this kind to obtain in this Court an order upon the magistrate to do something outside the ordinary course of his judicial functions. Then I agree with the learned counsel for the applicant that the police magistrate was *functus officio*, and that sect. 5 of 11 & 12 Vict.

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c. 44, only enables us to order the magistrate to perform his duty; if his duties were over, there is nothing for us to order him to perform. The applicant also has failed to convince us that he is entitled to claim this relief, even if we had power to order it. Of course we cannot try title. I do not know what the French law on that subject may be, or what might be the ultimate view of the matter in the courts of this country. The French law may hold that the mere possession of goods which have been stolen does not convey any interest at all. These goods were not bought by Otto in market overt there; it is not so alleged. It seems to me he has now no *prima facie* title to them, not even a possessory title, according to the doctrine acted upon in *Buckley v. Gross* (7 L. T. Rep. N. S. 743; 3 B. & S. 566; 32 L. J. 129, Q. B.), and that any possessory title which he may once have had has been lawfully divested by reason of the goods passing out of his possession under the direction of the court. There is nothing to justify our granting this application until the applicant makes out title to the goods, which he cannot do on an application of this nature. For all these reasons I think that this rule must be discharged, and I come to the conclusion with the less reluctance because it seems to me that the proper remedy of the applicant, if he has a grievance at all, is to bring an action against the persons in whose custody the goods are, and claim an injunction against their parting with them until the trial.

KENNEDY, J. concurred.

Rule discharged.

Solicitor for the applicant, *Joseph Davis*.

Solicitor for the magistrate, *Solicitor to the Treasury*.

QUEEN'S BENCH DIVISION.

Wednesday, May 23, 1894.

(Before CAVE and WRIGHT, JJ.)

HARPER (app.) v. MARCKS (resp.). (a)

Cruelty to animals—"Domestic animals"—*Lions in confinement*

—*Cruelty to Animals Act, 1849* (12 & 13 Vict. c. 92), ss. 2, 29

—*Cruelty to Animals Act, 1854* (17 & 18 Vict. c. 60), s. 3.

Five full-grown lions were confined in a cage and were kept in subjection by a man armed with a whip while a performance of

(a) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

dancing was given for profit in the cage by a lady dancer. Feats of jumping were also performed by one of the lions.

Held, that the lions were not "domestic animals" within the Cruelty to Animals Acts, 1849 and 1854.

Per Wright, J. ; A domestic animal is one which is of a kind ordinarily domesticated, and which is in fact domesticated

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c. 60, s. 3.*

CASE stated by a Metropolitan police magistrate under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49.

An information was preferred at the police-court, Westminster, by the appellant against the respondent under the Cruelty to Animals Act, 1849, s. 2, charging the respondent as follows, namely, that on the 27th day of February, 1894, at the Royal Aquarium, Westminster, he did cruelly beat, ill-treat, abuse, and torture a certain animal, to wit, a lion.

On behalf of the appellant it was conceded that ss. 2 and 29 of the Cruelty to Animals Act, 1849, and s. 3 of the Cruelty to Animals Act, 1854, applied to domestic animals only ; but it was contended that lions kept in confinement as hereafter described were domestic animals within the meaning of the Act.

The following facts were proved :

The lions in question were five in number, and between four and five years old. They were kept in a cage five yards long by four yards wide in the Imperial Theatre inside the Westminster Aquarium. There the public were admitted at an extra charge to see the performance in the cage, which was as follows : A lady known as a skirt dancer entered the cage accompanied by the respondent armed with a formidable whip in one hand and a strong pole with a steel head to it in the other. With the aid of these weapons the lions were kept in subjection while the lady danced ; and subsequently one of the lions was made to jump over a board several times.

According to the evidence of the appellant, considerable violence was used with the whip, but for the purposes of this case it was not to be assumed that any cruelty was used by the respondent, as his witnesses were not called in consequence of the magistrate's decision as hereinafter set out.

In no sense, except as above stated, did these lions differ in any way from any other wild animals kept in confinement at the Zoological Gardens or elsewhere.

The magistrate was of opinion that a lion, even when kept in confinement, was not a domestic animal within sect. 2 of the Cruelty to Animals Act, 1849, and he therefore dismissed the summons.

If the court should be of opinion that these lions were domestic animals, the case was to be remitted to the magistrate to be further dealt with on the question of whether they were cruelly used or not.

If the court should be of opinion that these animals did not

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come within that section of the Act, the judgment of the magistrate was to stand.

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By the Cruelty to Animals Act, 1849, s. 2:

Cruelty to Animals Acts 1849, s. 2: "If any person shall cruelly beat, ill-treat, overdrive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal, every such offender shall for every such offence forfeit and pay a penalty not exceeding 5*l*."

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By sect. 29:

The word "animal" shall be taken to mean any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog, cat, or any other domestic animal.
12 & 13 Vict. c. 92, ss. 2, 29;
17 & 18 Vict. c. 60, s. 3.

By the Cruelty to Animals Act, 1854, s. 3:

The words and expressions to which a meaning is affixed by 12 & 13 Vict. c. 92, and which are introduced into this Act, shall have the same meaning in this Act, and the word "animal" shall in the said Act mean any domestic animal, whether of the kind or species particularly enumerated in clause 29 of the said Act or of any other kind or species whatever, and whether quadruped or not.

Willis, Q.C. (*Colam* with him) for the appellant, submitted that: The magistrate was wrong in holding that these lions were not domestic animals. They had been brought under the control of man, and had been trained to perform and bring profit to their owner. They were therefore domestic animals within the Act. An animal is none the less domestic because it is vicious, or because it is one of a class which is not ordinarily domestic; and it was a question of fact in each case whether the individual animal was domestic: (*Swan v. Sanders*, 44 L. T. Rep. 424; 50 L. J. 67, M. C.; *Colam v. Pagett*, 12 Q. B. Div. 66; *Aplin v. Parritt*, 69 L. T. Rep. 433; (1893) 2 Q. B. 57; *Budge v. Parsons*, 3 B. & S. 379; *Filburn v. People's Palace and Aquarium Company Limited*, 25 Q. B. Div. 258.)

Bonsey, for the magistrate was not called on.

The respondent did not appear.

CAVE, J.—I am of opinion that the answer to the question contained in this special case is, that these lions are not domestic animals within the meaning of the Acts. They are merely wild animals in confinement, and, in my opinion, wild animals in confinement are not yet brought within the protection given by the Acts. The Acts of Parliament which deal with this subject are of modern date, and the strong public feeling which led to their being passed has been gradually accumulating and strengthening. It may be that at some future date the Legislature will say that wild animals in confinement shall not be ill-used, but as yet it has not done so. The list of animals mentioned in sect. 29 are all tame animals which serve some useful purpose to mankind, and the words "other domestic animals" cannot be extended beyond the features which the animals specified possess generally. The only general feature which they possess is that they may all be tamed to serve some purpose for the use of man. In some cases the species is so altered as to be quite different from the wild stock from which it was derived. Before a wild animal can be called "domestic"

it must have been tamed and made sub-servient to the use of man. Merely keeping it in confinement is not sufficient to make it domestic. The strongest case in favour of the appellant is that of the linnets (*Colam v. Pagett, ubi sup.*). That case goes some way, because the linnets had been originally wild birds; but they had been caught and trained to be used as decoys, and for that purpose they were subservient to the use of man. That case can be supported on that ground, and on that ground only. In the present case the lions are kept in a cage, and are merely prevented by terror from following their natural instinct and tearing the dancer to pieces. It is impossible under those circumstances to say that the lions are domestic animals. I agree with the decision of the learned magistrate, and am of opinion that this appeal must be dismissed.

WRIGHT, J.—I am of the same opinion. I agree with Mr. Willis to this extent, that I think an animal, however wild by nature, may become domestic under certain circumstances; for example, wild elephants caught in the woods and trained to be of service to mankind might be called domestic animals. Domestic is not the same thing as domesticated, but I should say that an animal ought to be regarded as domestic which is of a kind ordinarily domesticated, and which is in fact domesticated.

Appeal dismissed.

Solicitors for the appellant, *Lindsay, Greenfield, and Masons.*
Solicitor for the magistrate, *Solicitor to the Treasury.*

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*Cruelty to
Animals Acts
—" Domestic
animals"—
Lions in con-
finement—*

12 & 13 Vict.
c. 92, ss. 2, 29;
17 & 18 Vict.
c. 60, s. 3.

QUEEN'S BENCH DIVISION.

March 19 and 20, 1894.

(Before CAVE and WRIGHT, JJ.)

REG. v. BERGER. (a)

*Obstruction of highway—Conviction for—Right to new trial—
Evidence—Map annexed to Inclosure Award—Admissibility of
map for purpose of showing boundaries of property.*

*Upon an indictment preferred in the Queen's Bench Division for
obstructing a highway, a defendant, who has been found guilty,
may have a new trial on the grounds of misreception of evidence*

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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and that the verdict was against the evidence; though, if there had been a verdict of acquittal, a new trial could not have been granted against the defendant.

Upon the trial of such an indictment, when the allegation is that the defendant, an owner of land adjoining the highway, has inclosed a strip of land which formed part of the highway, a map annexed to an inclosure award made under an Inclosure Act for inclosing certain commons, when the commissioners had no jurisdiction to deal with, and had not in fact dealt with, the strip of land in question, is not admissible in evidence for the purpose of showing what were the limits of the highway or the defendant's property respectively at the time when the map was made.

RULE on behalf of the defendant, calling on the prosecutors, the Finchley Local Board, to show cause why the verdict obtained for the Crown in the case of *Reg. v. Berger* should not be set aside and a new trial had on the grounds of misdirection, misreception of evidence, and the verdict being against evidence.

An indictment was found by the grand jury of the county of Middlesex and was preferred against the defendant in the Queen's Bench Division of the High Court, charging him with having obstructed a highway called the Great North road, near Whetstone, in the county of Middlesex, by inclosing certain strips or pieces of land and placing a fence and houses and buildings thereon.

The case was tried in the Queen's Bench Division, before Lawrance, J. and a jury, on the 12th day of February, 1894, when from the evidence given it appeared that the defendant was the owner of a piece of land lying on one side of the highway in question; that on this land there were some houses the access to which was over the strips of land in front of them respectively, and that the defendant had built upon these strips some new houses with post and rails to the footpath.

The allegation of the local board was that the defendant had extended his fences so as to inclose these strips of land lying between his original fences and the highway, and they said that the land so inclosed formed part of the highway, and the question at the trial was whether the strips of land so inclosed by the defendant was the property of the defendant or formed part of the highway.

Evidence was given on behalf of the defendant to show (among other things) that he and his predecessors in title had exercised acts of ownership over the strip of land in question, and on behalf of the prosecutors, amongst other evidence to show that the land formed part of the highway, there was tendered in evidence a map attached to an inclosure award made in 1814.

This award was made by Commissioners acting under an Inclosure Act, 51 Geo. 3, c. xxiii. (an Act for inclosing lands in

the parish of Finchley, in the county of Middlesex), sect. 46 of which Act provided :

That the award to be made by the said commissioners, under the authority of this Act, together with a proper map or plan of the said commons and waste lands thereto annexed, shall . . . be delivered to the clerk of the peace for the said county of Middlesex, who is hereby required to deposit and keep the same among the records of the said county, so that recourse may be had thereto by any person or persons interested in the premises . . . and the said award shall, from and after the delivery thereof to the said clerk of the peace, be deemed and taken to be enrolled according to the directions and within the meaning of the said Act hereinbefore referred to, and a copy of the said award, with a proper map or plan of the allotments to be set out for the proprietors of estates in the said parish, shall be deposited in the parish church of Finchley, and the said award and copy thereof . . . attested by the said clerk of the peace or his deputy, shall from time to time and at all times thereafter be admitted and allowed as legal evidence of matters and things therein contained in all courts whatsoever.

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The map was tendered in evidence for the purpose of showing that at the date when it was made the strip of land in question was not inclosed or separated from the highway, but formed part of it. The map had been duly made under the authority of the Inclosure Commissioners, and the award and map were both produced from the proper custody.

The land in question was not dealt with in any way by the award, and, although the highway was shown on the map, there was no allegation by the prosecutors that the commissioners had jurisdiction to deal with or define the property of the predecessors in title of the defendant, or set out the limits of the same.

The defendant objected that the map was not admissible in evidence for the purpose for which it was tendered, but the learned judge overruled the objection and admitted the map.

The jury found a verdict of guilty, and the defendant obtained a rule *nisi* for a new trial upon the grounds already set out.

Philbrick, Q.C. and *A. Macmorran* for the prosecutors, showed cause; and submitted that upon an indictment for a criminal offence, for an act, not of non-repair of the highway or other nonfeasance, but for the obstruction of the highway, which is an act of misfeasance for which a person on conviction is liable to fine and imprisonment, the Court has no jurisdiction to grant a new trial after a conviction, any more than it has to grant a new trial after an acquittal, and it was extremely clear from the authorities that there is no such power in the case of an acquittal. In a criminal case, assuming that there has been no misconduct or gross miscarriage in the proceedings, the Court cannot entertain a rule for a new trial upon the grounds stated in the present rule. It was laid down in *Pratt on Highways* (13 edit., p. 127) : that "This being a criminal proceeding, a new trial will not be granted after acquittal or conviction, either on the ground of misreception of evidence, misdirection, or that the verdict is against evidence." So, in *Short and Mellor's Crown Office Practice*, p. 252, it is said : "Where, however, the case is strictly a criminal one and renders the defendant liable to imprisonment upon conviction, as upon an indictment for obstruction to a highway, it is clear that there can be no new trial." [*WRIGHT, J.*—

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That is with reference to cases of acquittal.] It is submitted that it is not limited to that, though no case can be found where a verdict of guilty has been found and a new trial granted, except a case of a conviction for murder which came before the Privy Council in 1867 on appeal from the Supreme Court of New South Wales, namely, the case of *Reg. v. Bertrand* (16 L. T. Rep. 752; L. Rep. 1 P. C. 520). The last case on the subject was *Reg. v. Duncan* (44 L. T. Rep. 521; 7 Q. B. Div. 198). There there was an acquittal, and it was held that a new trial could not be granted, and there was no distinction for the present purpose in point of principle between an acquittal and a conviction. The defendant could take his chance, and if the maxim *Nemo debet bis vexari* applies in case of an acquittal, it ought also to apply in case of a conviction, and search had been made in vain to find a case in which after conviction anybody supposed that the Court had power to grant a new trial. There was no reason why there should be a new trial in the case of a conviction for obstructing a highway any more than in the case of any other misdemeanour, and no such distinction could be drawn, and there was no reason why on an acquittal there should be no power to give a new trial, but for a conviction there should be power. [WRIGHT, J.—It is laid down the other way in Archbold's Pleading in Criminal Cases (21st edit., p. 207), where it is said: "Where an indictment has been preferred in the Queen's Bench Division, or has been removed into that court by *certiorari*, a new trial may, after conviction, be moved for," upon such grounds as are given in this rule.] That was in case of a conviction for a nonfeasance, but there is not a single case to show that that can be done where the conviction is for a misfeasance. The distinction between convictions for nonfeasance and a misfeasance is well shown by the case of *Reg. v. Johnson* (2 E. & E. 613), and especially by the judgment of Crompton, J. in that case. [WRIGHT, J.—There is a case of *Rez v. Fowler* (4 B. & Ald. 273)—a case of felony—which is against you, and there is another authority of no mean weight in 1 Chitty's Criminal Law (2nd edit., p. 654), where it is said: "In all cases of misdemeanour, after a conviction there is no doubt that the superior courts may grant a new trial, in order to fulfil the purposes of substantial justice." So in *Reg. v. Whitehouse* (1 Dears. 1) there was a new trial granted after a conviction for misdemeanour.] The point was not taken in that case. There is no case which shows that when there is a verdict one way there may be a new trial, but if the other way no new trial. With regard to the point as to the misreception of evidence, there is authority to show that, when the question is "highway" or "no highway," old maps can be received if they come from the proper custody and are made by persons who have some knowledge of the locality: (*Hammond v. Bradstreet*, 10 Ex. 390; *Freeman v. Read*, 4 B. & S. 174.) These cases lay down that evidence of reputation is admissible under such circumstances. In *Freeman v. Read* (*ubi sup.*) a very old map was tendered, and the Court held that it could be received in evidence.

[There was further argument on the question of the verdict being against evidence, which is not now material.]

Crump, Q.C. and *Macaskie* for the defendant, in support of the rule, were not called upon.

Cave, J.—This is a motion for a new trial in the case of an indictment preferred in this court against the defendant for obstructing the highway. It was first of all contended on behalf of the prosecutors that such a motion as this could not be made upon the grounds upon which it was sought to be substantiated; but it is laid down in text-books of undoubted authority that such a motion may be made on those grounds, and our attention has not been called to any case in which that law has been doubted. It has no doubt been laid down that such a motion cannot be made where there has been a verdict of acquittal; but that proceeds upon a principle which is applicable to cases of acquittal alone. That principle is that where a man has once been put in peril upon a criminal charge, he cannot be put in peril again upon the same grounds. But that doctrine, which is particularly a doctrine in favour of the accused party, does not apply where the application for a new trial is made after a conviction, and the prosecution here are unable to show us any authority which alleges that it does. I am therefore of opinion that it is open to the defendant to make this motion upon the grounds which have been put forward. When we come to the merits of the case, it appears to me that the learned judge went somewhat too far in admitting the map of 1814 for the purposes for which it was admitted. The evidence without that map went strongly in favour of the defendant. Part of the evidence showed undoubtedly that there were on either side of the defendant's premises inclosures which went up to the footpath as subsequently laid out by the highway authority, and that state of things would have been eminently favourable to the defendant, because it is quite possible that the defendant or his predecessors in title should have allowed this spot of land to have remained open and unfenced from the public way for the more easy access of people to their property and to the houses and shops which were in existence there, and it is very unlikely that he should have dedicated this little inlet as a portion of the high road to be used by the public to the exclusion of himself and his successors in title for ever. That was a great difficulty in the way of the prosecution; but it was met by the production of the Inclosure Award map, and especially by the production of an enlarged drawing of a portion of it, and, undoubtedly, looking at that map, there would seem to have been—if that map is accurate—no inclosures to the south of the defendant's property, and an inclosure to the north much less than those which were proved by one witness to have existed much more recently than the date of that map. It seems to me that with that map the prosecution had a strong case to make, because, if that map was reliable, there were no such inclosures in 1814, and consequently it would

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follow that all those inclosures were encroachments subsequent to 1814, and that none of them would be entitled to remain, and that was the contention of the prosecution. The difficulty, then, arises that the learned judge at the trial admitted this map for purposes for which it was not admissible. It seems to me that, inasmuch as the map was made by one of the public, it could not have been excluded upon a question of reputation as to whether the Great North road was a public highway or not; but that point was not for a moment in dispute. On the other hand, it seems to me that as a proof, or even as evidence, that there were in 1814 no inclosures south of the defendant's property, this map was entirely inadmissible, and it was for that purpose, and that purpose only, that it was sought to be proved. The authorities establish this, that, although hearsay is good evidence of reputation in matters of public and general interest so far as the general question is concerned, hearsay is not good evidence of any particular fact from which the general fact is sought to be drawn. An old map, no matter, apparently, by whom made, so long as the man is shown to be dead—which may be inferred in this case—would be evidence of reputation that there was a road in the particular direction shown upon the map, if the contest had been whether there was a public highway or not. But it was not evidence for the purpose of showing what exactly were the boundaries of that particular highway, and that appears to have been the main use, and the very conclusive use, to which that map was put in the hands of the prosecution, and was the purpose for which it was admitted by the learned judge. It seems to me that he went beyond what the cases warrant in admitting the map for that purpose, and one cannot doubt for a moment the very great effect which that map must have produced upon the jury. It seems to me, therefore, that under those circumstances there was a wrongful admission of evidence of a kind which was very effective and likely to have very strong weight indeed with the jury, and that consequently the case ought to go down for a new trial.

WEIGHT, J.—I am of the same opinion, and for the same reasons.

Rule absolute for a new trial.

Solicitors: for the prosecutors, *Stevens and Parkes*; for the defendant, *V. I. Chamberlain*.

CROWN CASES RESERVED.

Saturday, April 21, 1894.

(Before Lord COLERIDGE, C.J., HAWKINS, MATHEW, CAVE, and GRANTHAM, JJ.)

REG. v. SOWERBY. (a)

Practice—False pretences—Indictment—Necessary averment—Person to whom pretence made—24 & 25 Vict. c. 96, s. 88.

An indictment for obtaining or attempting to obtain money, &c., by means of a false pretence which does not state to whom the pretence was made, nor from whom the money, &c., was obtained or attempted to be obtained, is bad.

The form of indictment in Rex v. Douglass (1 Camp. 212) followed, and the form in Reg. v. Hunter (10 Cox C. C. 642) disapproved of.

CASE stated by the quarter sessions for the county of Durham, as follows:—

1. At the general quarter sessions held before me at the city of Durham in and for the county of Durham on Monday, the 1st day of January, 1894, defendant was arraigned on an indictment of which the following is a copy:

The jurors for our Lady the Queen upon their oath present that William Marr and Obadiah Blenkinsopp on the 28th day of Sept., A.D. 1893, were in the employ and service of the Butterknowle Colliery Company Limited, at the Quarry Pit of the Butterknowle Colliery, in the county of Durham, as hewers of coal, and were entitled to payment from their said employers of the sum of fivepence for every tub of coal wrought and filled by them; and the jurors aforesaid upon their oath aforesaid do further present that Joseph Sowerby the younger, on the day and year aforesaid, unlawfully, knowingly, and designedly did by placing a token upon a certain tub of coals in the said pit falsely pretend that the said Joseph Sowerby the younger had wrought and filled the said tub of coals, by means of which said false pretences the said Joseph Sowerby the younger did unlawfully attempt to obtain the sum of fivepence of the moneys of the said Colliery Company Limited with intent to defraud, whereas in truth and in fact the said Joseph Sowerby the younger had not wrought or filled the said tub of coals as he then well knew, against the form, &c.

2. Defendant's counsel submitted that the indictment was bad upon the following points: (a) That it was not stated to whom the false pretence was made. (b) That it was not stated from whom the money was attempted to be obtained.

8. I was of opinion that the indictment contained sufficient particulars of the offence charged, and I overruled the objection, but reserved the above points for the consideration and opinion of this Court.

(a, Reported by R. CUNNINGHAM, GLEN, Esq., Barrister-at-Law.

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4. Defendant thereupon pleaded not guilty to the said indictment, and was tried by a jury duly sworn, who returned a verdict of guilty. I postponed sentence until next session, and the defendant was liberated on bail pending the decision of the Court.

5. The opinion of the court is requested whether the said indictment was good and sufficient in law, and whether the defendant was lawfully found guilty on such indictment.

J. Strachan, on behalf of the prisoner, submitted that it was necessary in an indictment for false pretences to allege that the pretence was made to a particular person, and to state from whom the article obtained by the false pretence had been obtained. This was the form in *Reg. v. Douglass* (1 Camp. 212), which form had been followed ever since, except that in *Reg. v. Hunter* (10 Cox C. C. 642) the indictment was similar to the present, but there no objection was taken to its form.

No one appeared on behalf of the prosecution.

LORD COLERIDGE, C.J.—I have, though with reluctance, come to the conclusion that this conviction must be quashed. It is very important in criminal matters that we should follow the old precedents and authorities; and no case decides that an indictment for obtaining money by false pretences is good which does not state what the false pretence was. Now, a pretence means the holding out to some other person. The person to whom the pretence is held out must therefore be stated. The old form of indictment states that the defendant falsely pretended to a person named, and alleges that by means of such false pretence the prisoner obtained from the prosecutor, &c. Here there is no such statement, and neither the person to whom the pretence was made nor the person from whom it was attempted to obtain the money is stated. I do not know why the old form, which has lasted for nearly a hundred years, and which is known to all lawyers, was not followed here. This indictment, however, has not been drawn in that form, with the result that two essential parts of the charge are omitted. It is true that the indictment contains an averment that the moneys were the property of the Butterknowle Colliery Company; but that averment is rendered unnecessary by the statute which creates the offence, and an averment which is unnecessary cannot supply the place of an averment which is necessary. In my opinion, therefore, this conviction should be quashed.

HAWKINS, MATHEW, CAVE, and GRANTHAM, JJ. concurred.

Conviction quashed.

Solicitors for the defendant, *Field* and *Roscoe*, for *Maw*, *Teale*, and *Tomlinson*, of Bishop Auckland.

APPENDIX.

STATUTES AND PARTS OF STATUTES AFFECTING THE CRIMINAL LAW, PASSED IN THE SESSION OF PARLIAMENT OF 1890.

LUNACY ACT, 1890.

53 VICT. CAP. 5.

*An Act to consolidate certain of the Enactments respecting Lunatics.—
[29th March, 1890.]*

Employment of Males in care of Females.

53. It shall not be lawful to employ any male person in any institution for lunatics in the personal custody or restraint of any female patient, and any person employing a male person contrary to this section shall be liable to a penalty not exceeding twenty pounds. Provided that this section shall not extend to prohibit or impose a penalty on the employment of male persons on such occasions of urgency as may in the judgment of the manager of the institution render such employment necessary, but the manager shall in each case report the employment to the visiting Commissioners or visitors at their next visit. Males not to be employed in personal custody of females.

220. If a licensee receives into his licensed house any patients beyond the number specified in the licence, or fails to comply with the regulations of the licence as to the sex of the patients or the class of patients, he shall for each patient received contrary to his licence forfeit fifty pounds. Penalty for infringing licence.

222. If after the lapse of two months from the expiration or revocation of the licence of any house, there are in the house two or more lunatics, every person keeping the house or having the care or charge of the lunatics therein, shall be guilty of a misdemeanour. Detention of lunatics after expiration or revocation of a licence a misdemeanour.

PART XI.—PENALTIES, MISDEMEANOURS, AND PROCEEDINGS.

815. (1.) Every person who, except under the provisions of this Act, receives or detains a lunatic, or alleged lunatic, in an institution for lunatics, or for payment takes charge of, receives to board or lodge, or detains a lunatic or alleged lunatic in an unlicensed house, shall be guilty of a misdemeanour, and in the latter case shall also be liable to a penalty not exceeding fifty pounds. Lunatics not to be detained except in accordance with Act.

(2.) Except under the provisions of this Act, it shall not be lawful for any person to receive or detain two or more lunatics in any house unless the house is an institution for lunatics or workhouse.

- 53 VICT. c. 5. (3.) Any person who receives or detains two or more lunatics in any house, except as aforesaid, shall be guilty of a misdemeanour.
- Lunacy Act, 1890.* 316. The manager of any hospital or licensed house, and any person having charge of a single patient who omits to send to the Commissioners the prescribed documents and information upon the admission of a patient, or to make the prescribed entries, and give the prescribed notices upon the removal, discharge, or death of a patient, shall be guilty of a misdemeanour, and in the case of a single patient shall also be liable to a penalty not exceeding fifty pounds.
- Neglect to send notices on admission a misdemeanour. 317. (1.) Any person who makes a wilful mis-statement of any material fact in any petition, statement of particulars, or reception order under this Act, shall be guilty of a misdemeanour.
- Mis-statements. (2.) Any person who makes a wilful mis-statement of any material fact in any medical or other certificate, or in any statement or report of bodily or mental condition under this Act, shall be guilty of a misdemeanour.
- (3.) A prosecution for a misdemeanour under this section shall not take place except by order of the Commissioners, or by the direction of the Attorney-General or the Director of Public Prosecutions.
- False entries. 318. Any person who in any book, statement, or return, knowingly makes any false entry as to any matter as to which he is by this Act or any rules made under this Act required to make any entry, shall be guilty of a misdemeanour.
- Notice to coroner of death. 319. If the manager of an institution for lunatics, or the person having charge of a single patient, omits to send to the coroner notice of the death of a lunatic within the prescribed time, he shall be guilty of a misdemeanour.
- Penalty for non-compliance with the Act and rules. 320. Any person who makes default in sending to the Commissioners or any other person any return, report, extract, copy, statement, notice, plan, or document, or any information within his knowledge or obtainable by him, when required so to do under this Act or any other Act relating to lunacy, or any rules made under this Act or in complying with the said Acts or rules, shall for each day or part of a day during which the default continues be liable to a penalty not exceeding ten pounds, unless a penalty is expressly imposed by this or any other Act for such default: Provided that all or any part of the cumulative penalties may be remitted by the court in any case in which it is made to appear to the satisfaction of the court that the original default or its continuance during any period of time arose from mere accident or oversight, and not from wilful or culpable neglect on the part of the person sued.
- Obstruction. 321. (1.) Any person who obstructs any Commissioner or Chancery or other visitor in the exercise of the powers conferred by this or any other Act, shall for each offence be liable to a penalty not exceeding fifty pounds, and shall also be guilty of a misdemeanour.
- (2.) Any person who wilfully obstructs any other person authorised under this Act by an order in writing under the hand of the Lord Chancellor or a Secretary of State, to visit and examine any lunatic or supposed lunatic, or to inspect or inquire into the state of any institution for lunatics, gaol, or place wherein any lunatic or person represented to be lunatic is confined or alleged to be confined, in the execution of such order, and any person who wilfully obstructs any person authorised under this Act by any order of the Commissioners to make any visit and examination or inquiry in the execution of such order, shall (without prejudice to any proceedings, and in addition to any punishment to which such person obstructing the execution of such order would otherwise be subject) be liable for every such offence to a penalty not exceeding twenty pounds.

322. If any manager, officer, nurse, attendant, servant, or other person employed in an institution for lunatics or any person having charge of a lunatic, whether by reason of any contract, or of any tie of relationship, or marriage or otherwise, illtreats or wilfully neglects a patient, he shall be guilty of a misdemeanour, and, on conviction on indictment shall be liable to fine or imprisonment, or to both fine and imprisonment at the discretion of the court, or be liable on summary conviction for every offence to a penalty not exceeding twenty pounds nor less than two pounds.

58 Vict. c. 5.
Lunacy Act,
1890.

III.—treatment.

323. If any manager, officer, or servant of an institution for lunatics wilfully permits, or assists, or connives at the escape or attempted escape of a patient, or secretes a patient, he shall for every offence be liable to a penalty not exceeding twenty pounds nor less than two pounds.

Penalties for
permitting
escape and
for rescue.

324.—If any manager, officer, nurse, attendant, or other person employed in any institution for lunatics (including an asylum for criminal lunatics), or workhouse, or any person having the care or charge of any single patient, or any attendant of any single patient, carnally knows or attempts to have carnal knowledge of any female under care or treatment as a lunatic in the institution, or workhouse, or as a single patient, he shall be guilty of a misdemeanour, and on conviction on indictment, shall be liable to be imprisoned with or without hard labour for any term not exceeding two years; and no consent or alleged consent of such female thereto shall be any defence to an indictment or prosecution for such an offence.

Abuse of
female lunatic.

325. (1.) Except as by this Act otherwise provided, proceedings against any person for offences against this Act may be taken—

By whom
proceedings to
be taken.

- (a.) By the secretary of the Commissioners upon their order for any offence;
 - (b.) By the clerk of the visitors of any licensed house for an offence committed within their jurisdiction;
 - (c.) By the clerk of the visiting committee of an asylum for any offence by any person employed therein;
- and such proceedings shall not abate by the death or removal of the prosecuting secretary or clerk, but the same may be continued by his successor, and in any such proceedings the prosecuting secretary or clerk shall be competent to be a witness.

(2.) Except as by this Act otherwise provided, it shall not be lawful to take such proceedings except by order of the Commissioners, or of visitors having jurisdiction in the place where the offence was committed, or with the consent of the Attorney-General or Solicitor-General.

326. All penalties enforceable under this Act shall be recovered summarily according to the provisions of the Summary Jurisdiction Acts, and shall be paid—

Recovery and
application of
penalties.

- a. When recovered by the Secretary of the Commissioners, to such secretary;
- b. When recovered by the clerk of the visitors of a licensed house, to the clerk of the peace for the county or borough, to be applied in the same way as money received for licences granted by the justices of the county or borough;
- c. When recovered by a clerk of the visiting committee of an asylum, to the treasurer of the asylum for the purposes thereof;
- d. In all other cases to the treasurer of the county or borough for which the convicting justices acted.

327. Any person aggrieved by an order of justices under this Act, other than orders adjudicating as to the settlement of a lunatic pauper and

53 VICT. c. 5. providing for his maintenance, may appeal to a court of quarter sessions, subject to the conditions and regulations of the Summary Jurisdiction Lunacy Act, 1890.

Secretary of State may direct prosecution.
Evidence upon prosecution.

328. A Secretary of State, on the report of the Commissioners or visitors of any institution for lunatics, may direct the Attorney-General to prosecute on the part of the Crown any person alleged to have committed a misdemeanour under this Act.

329. (1.) Where any person is proceeded against under this Act on a charge of omitting to transmit or send any copy, list, notice, statement, report or other document required to be transmitted or sent by such person, the burden of proof that the same was transmitted or sent within the time required shall lie upon such person ; but if he proves by the testimony of one witness upon oath that the copy, list, notice, statement, report, or document in respect of which the proceeding is taken was properly addressed and put into the post in due time, or (in case of documents required to be sent to the Commissioners or a clerk of the peace or a clerk to guardians) left at the office of the Commissioners or of the clerk of the peace or clerk to guardians, such proof shall be a bar to all further proceedings in respect of such charge.

(2.) In proceedings under this Act, where a question arises whether a house is or is not a licensed house or registered as a hospital, it shall be presumed not to be so licensed or registered unless the licence or certificate of registration is produced, or sufficient evidence is given that a licence or certificate is in force.

Protection to persons putting the Act in force.

330. (1.) A person who before the passing of this Act has signed or carried out or done any act with a view to sign or carry out an order purporting to be a reception order, or a medical certificate that a person is of unsound mind, and a person who after the passing of this Act presents a petition for any such order, or signs or carries out or does any act with a view to sign or carry out an order purporting to be a reception order, or any report or certificate purporting to be a report or certificate under this Act, or does anything in pursuance of this Act, shall not be liable to any civil or criminal proceedings whether on the ground of want of jurisdiction or on any other ground if such person has acted in good faith and with reasonable care.

(2.) If any proceedings are taken against any person for signing or carrying out or doing any act with a view to sign or carry out any such order, report, or certificate, or presenting any such petition as in the preceding sub-section mentioned, or doing anything in pursuance of this Act, such proceedings may, upon summary application to the High Court or a judge thereof, be stayed upon such terms as to costs and otherwise as the court or judge may think fit, if the court or judge is satisfied that there is no reasonable ground for alleging want of good faith or reasonable care.

Commissioners and visitors may summon witnesses—
Form 22.

332. (1.) The commissioners, or any two of them, and also the visitors of any licensed house, or any two of them, may, as they see occasion, require, by summons, under the common seal of the Commission, if by the Commissioners, and if by two only of the Commissioners or by two visitors, then under the hands and seals of such two Commissioners or two visitors, as the case may be, any person to appear before them to testify on oath touching any matters respecting which such Commissioners and visitors respectively are by this Act authorised to inquire (which oath such Commissioners or visitors are hereby empowered to administer).

(2.) Every person who does not appear pursuant to the summons, or

does not assign some reasonable excuse for not appearing, or who appears and refuses to be sworn or examined, shall, on being convicted thereof before a court of summary jurisdiction for every such neglect or refusal be liable to a penalty not exceeding fifty pounds. 53 Vict. c. 5.
Lunacy Act,
1890.

340. (1.) Save as in this Act otherwise expressly provided this Act shall not extend to criminal lunatics. Savings as to
criminal
lunatics, &c.—
49 & 50 Vict
c. 25.

INLAND REVENUE REGULATION ACT, 1890.

53 & 54 VICT. CAP. 21.

An Act to consolidate certain Enactments relating to the Regulation of the Inland Revenue.—[25th July, 1890.]

10. (1.) If any Commissioner or collector, or officer, or person employed in relation to inland revenue directly or indirectly asks for or receives any sum of money or any other recompense whatsoever, or any promise or security for any sum of money or other recompense, or enters into or acquiesces in any collusive agreement with any person to do or abstain from doing, or to conceal or connive at any act or thing whereby Her Majesty is or may be defrauded, he shall for every such offence incur a fine of five hundred pounds, and shall on conviction thereof be incapable of ever holding any office under the Crown. Penalty on
persons enter-
ing into collu-
sive agree-
ment.

(2.) If any person directly or indirectly gives or offers to give to any Commissioner, or collector, or officer, or person so employed, any sum of money or other recompense whatsoever, or any security for any sum of money or other recompense, or proposes or enters into any collusive agreement with any Commissioner, collector, officer, or person so employed in order to corrupt and prevail upon him to do or abstain from doing or to conceal or connive at any act or thing whereby Her Majesty is or may be defrauded, or to do or omit or permit or suffer to be done or omitted any act contrary to his duty, every person so offending shall for every such offence (whether the sum of money or other recompense or security for the same, or the agreement is or is not received, entered into, acquiesced in, or performed) incur a fine of five hundred pounds.

(3.) On the commission of any offence against this section, the offender who, before any information is lodged against him in respect of the offence, first discovers and informs against any other offender shall on the conviction of the person against whom the information is given be discharged and acquitted from any fine or disqualification to which at the time of giving the information he was liable by reason of the offence committed by him.

11. If any person by himself or by any person in his employ obstructs, molests, or hinders— Obstruction
of officers.

(a.) an officer or any person employed in relation to inland revenue in the execution of his duty, or of any of the powers or authorities by law given to the officer or person; or,

(b.) any person acting in the aid of an officer or any person so employed; he shall for every such offence incur a fine of one hundred pounds.

12. If any person not being an officer takes or assumes the name, designation, or character of an officer for the purpose of thereby obtaining admission into any house or other place, or of doing or procuring to be done any act which he would not be entitled to do or procure to be done of Unlawful
assumption of
character of
officer.

- 53 & 54 VICT. c. 21. his own authority, or for any other unlawful purpose, he shall be guilty of a misdemeanour, and shall in addition to any other punishment to which he may be liable for the offence, be liable, on summary conviction, to be imprisoned with or without hard labour, for any term not exceeding three months.
- Inland Revenue Regulation Act, 1890.*

POLICE ACT, 1890.

53 & 54 VICT. CAP. 45.

An Act to make provision respecting the Pensions, Allowances, and Gratuities of Police Constables in England and Wales, and their Widows and Children, and to make other provisions respecting the Police of England and Wales.—[14th August, 1890.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PART I.

Superannuation of Constables.

Right of constables to pensions.

1. Subject to the provisions of this Act, every constable in a police force—

- (a.) if he has completed not less than twenty-five years approved service, and where a limit of age is prescribed by the pension scale in force under this Act, is of an age not less than the age so prescribed, shall, on the expiration of such time not exceeding four months after he has given written notice to the police authority of his desire to retire as the police authority may fix, be entitled without a medical certificate to retire and receive a pension for life; and
- (b.) if after he has completed fifteen years approved service he is incapacitated for the performance of his duty by infirmity of mind or body, shall be entitled on a medical certificate to retire, and receive a pension for life; and,
- (c.) if before he has completed fifteen years approved service he is incapacitated for the performance of his duty by infirmity of mind or body, shall be entitled on a medical certificate to retire, and thereupon the police authority may, if they think fit, grant him a gratuity; and,
- (d.) if at any time he is incapacitated for the performance of his duty by infirmity of mind or body occasioned by an injury received in the execution of his duty without his own default, shall be entitled on a medical certificate to retire and receive a pension for life.

Pension allowances and gratuities to widow and children.

2. (1.) If a constable dies whilst in a police force from the effect of an injury received in the execution of his duty without his own default, the police authority shall grant a pension to his widow, and allowances to his children.

(2.) If a constable dies whilst in a police force from any other cause, the police authority may, if they think fit, grant gratuities to his widow and children or any of them.

(3.) If a constable to whom a pension has been granted because he was incapacitated for the performance of his duty by an injury received in the execution of his duty without his own default, dies from the effects of the injury within twelve months after the grant of the pension, the police authority may, if they think fit, grant a pension to his widow, either for a term of years or otherwise.

53 & 54 Vict.
c. 45.
Police Act,
1890

(4.) If a constable to whom a pension has been granted dies within twelve months after the grant of the pension, the police authority may, if they think fit, grant gratuities to his widow and children or any of them.

3. (1.) The pensions, allowances, and gratuities granted to constables of a police force and to their widows and children shall be in accordance with the pension scale for the force. *Pension scale.*

(2.) The pension scale for a police force shall be—

(a.) as regards ordinary pensions, a fixed scale adopted by the police authority within the maximum and minimum limits set forth in Part I. of the First Schedule to this Act; and

(b.) as regards special pensions and allowances and gratuities, the scale set forth in Part II. of that Schedule.

(3.) The police authority shall before the first day of January one thousand eight hundred and ninety-one send to the Secretary of State a copy of the scale adopted by them for ordinary pensions.

(4.) If any police authority do not before the said date adopt a fixed scale for ordinary pensions and send a copy thereof to the Secretary of State, the Secretary of State may frame for that authority a fixed scale for ordinary pensions within the maximum and minimum limits set forth in Part I. of the First Schedule to this Act, and that scale shall have the same effect as if it were a scale adopted by the police authority under this section.

(5.) The pension scale for each force shall come into operation on the commencement of this Act.

(6.) A police authority may from time to time adopt and send to the Secretary of State a new scale for ordinary pensions in lieu of the scale for the time being in force, but any such scale shall not, without the consent of the constable apply to any constable appointed before the day of its coming into operation.

(7.) The rules contained in Part III. of the First Schedule to this Act shall apply to all pensions, allowances, and gratuities granted under this Act.

4. (1.) The service of a constable for the purposes of this Act shall be subject to such deductions in respect of sickness, misconduct, or neglect of duty as may be made therefrom in pursuance of the regulations of the force to which the constable belongs; and the expression "approved service" shall for the purposes of this Act mean such service as may after such deductions as aforesaid (if any) be certified under the order of the police authority to have been diligent and faithful service, but shall not, unless the regulations of the police force otherwise prescribe, include service before twenty-one years of age. *Reckoning of service for pension.*

(2.) A certificate signed by the chief officer of a police force as to the period of a constable's approved service in that force shall be sufficient evidence thereof.

(3.) Where a deduction is made from a constable's service in respect of sickness, misconduct, or neglect of duty, notice of the deduction shall as soon as may be after the occurrence of the cause for which the deduction

53 & 54 Vict.
c. 45.

Police Act,
1890.

Proof of in-
capacity for
duty, liability
to serve again,
and revision
of pension.

is made be given to the constable; and the constable may appeal to the chief officer of his police force against any act of an officer of police superior to the constable which prevents him from reckoning any period of actual service as approved service, and any period of actual service allowed by the chief officer on such appeal shall be deemed to be approved service: Provided that, in the case of a borough having a separate police force, the decision of the chief officer shall be subject to the approval of the watch committee.

(4.) Where a constable has served in more than one police force in any part of the United Kingdom, approved service in any such police force in which he has completed not less than three years approved service, and from which he has with the written sanction of the chief officer of that force removed to another force, shall be reckoned as approved service in the force in which the constable is serving at the time of his retirement.

(5.) Where a constable with the knowledge of the police authority or of the chief officer of his police force belongs to the army reserve, and is called out for training or for permanent service, he shall be entitled, on returning to the police force after the end of such training or service, to reckon any approved service which he was entitled to reckon at the commencement thereof.

5. (1.) Before granting to a constable an ordinary pension on the ground of his being incapacitated by infirmity for the performance of his duty, the police authority shall be satisfied by the evidence of some legally qualified medical practitioner or practitioners, selected by the police authority, that the constable is so incapacitated, and that the incapacity is likely to be permanent.

(2.) Where the application is for a special pension, the police authority shall also be satisfied that the injury was received by the constable in the execution of his duty, that it was received without the default of the constable, and that the infirmity is attributable to the injury, and shall also determine whether the injury was accidental or not, and whether the disability of the constable for earning his livelihood is total or partial; and for the purpose of determining any of the said questions which ought to be determined on medical grounds shall take the like evidence as above mentioned.

(3.) Where a pension is granted to a constable on the ground of incapacity for the performance of his duty, the police authority shall yearly or otherwise, until the power under this Act of requiring the constable to serve again ceases, satisfy themselves that the incapacity continues, and, unless they resolve that such evidence is unnecessary, shall satisfy themselves by the like evidence as above mentioned.

(4.) In the event of the incapacity ceasing before the time at which the constable would, if he had continued to serve, have been entitled without a medical certificate to retire and receive a pension for life, the police authority may cancel his pension and require him to serve again in the police force, in a rank not less than the rank which he held before his retirement, and at a rate of pay not less than the rate which he received before his retirement.

(5.) Where a constable so serves again, the provisions of this Act as to retirement and pensions, allowances, and gratuities shall apply as if he had not previously retired, save that, except in the case of pensions for non-accidental injuries received in the execution of duty, he shall not reckon as approved service the time which elapsed

between his former retirement and the commencement of his service 53 & 54 Vict. c. 45.
again.

(6.) Where a pension is granted to a constable on a scale applicable to total disability for earning a livelihood, it shall be so granted for such period as may be fixed by the police authority, and, if at the expiration of that period the pensioner continues to be totally so disabled, the pension shall, in the discretion of the police authority, either be made permanent or renewed from time to time. If at any time before the pension is made permanent the police authority are satisfied by the evidence of a legally qualified medical practitioner that the pensioner's disability for earning his livelihood has become partial, the pension shall, within the limits allowed by the pension scale, be reduced to the amount allowed by the provisions of the scale applicable to cases of partial disability.

Police Act,
1890.

(7.) If a constable fails or refuses, when required by the police authority, to be examined by some legally qualified medical practitioner selected by that authority, the police authority may deal with the constable in all respects as if they were satisfied by the evidence of such a practitioner that the constable is not incapacitated for the performance of his duty or, as the case may be, is only partially disabled.

(8.) The decision of the police authority on the matters above in this section mentioned shall be final, save that in the case of a borough the constable may appeal to the council of the borough, and the decision of the council shall be final.

6. Where a constable retires on account of infirmity of mind or body, and the police authority are satisfied on medical evidence that the constable has brought about or contributed to the infirmity by his own default or his vicious habits, the police authority may, in their discretion, reduce the amount of his pension by an amount not exceeding one half of the pension to which he would be otherwise entitled. Power to reduce pension where infirmity partially due to misconduct.

7. The following provisions shall have effect with respect to every pension, allowance, and gratuity (in this section referred to as a "grant") payable by the police authority to any person (in this section referred to as the pensioner);— Assignment of pensions and regulations as to payment of pensions, &c.

- (1.) Every assignment of and charge on a grant, and every agreement to assign or charge a grant, shall, except so far as made for the benefit of the family of the pensioner, be void, and on the bankruptcy of the pensioner the grant shall not pass to any trustee or other person acting on behalf of the creditors.
- (2.) Where any parochial relief is given to a pensioner or to anyone whom he is liable to maintain, the police authority may pay the whole or any part of the grant to the guardians or other authority giving the relief, and the same, when so paid, may be applied in repayment of any sums expended in such relief, and, subject thereto, shall be paid or applied by the guardians or other authority to or for the benefit of the pensioner:
- (3.) If the pensioner neglects to maintain any person whom he is liable to maintain, the police authority may in their discretion pay or apply the whole or any part of the grant to or for the benefit of that person:
- (4.) If the pensioner appears to the police authority to be insane or otherwise incapacitated to act, the police authority may pay so much of the grant as the police authority think fit to the institution or person having the care of the pensioner, and may pay the

53 & 54 Vict.
c. 45.

Police Act,
1890.

surplus (if any) or such part thereof as the authority think fit for or towards the maintenance and benefit of the wife or relatives of the pensioner :

- (5.) On the death of a pensioner to whom a sum not exceeding one hundred pounds is due on account of a grant, then, if the police authority so direct, probate or other proof of the title of the personal representative of the deceased may be dispensed with, and the sum may be paid or distributed to or among the persons appearing to the police authority to be beneficially entitled to the personal estate of the deceased pensioner, or to or among any one or more of those persons, or in case of the illegitimacy of the deceased pensioner, to or among such persons as the police authority may think fit, and the police authority, and any officer of the police authority making the payment, shall be discharged from all liability in respect of any such payment or distribution :
- (6.) Any sum payable to a minor on account of a grant may be paid either to the minor or to such person and on such conditions for the benefit of the minor as to the police authority seems expedient.
- (7.) Where a payment is made to any person by a police authority in pursuance of this section, the receipt of that person shall be a good discharge to that authority for the sum so paid.
- (8.) A police authority may, with the consent of the Secretary of State, make rules with respect to declarations to be taken for any purpose relating to grants payable by that authority, and while any such rules made by a police authority are in force, a person shall not be entitled to receive any sum in respect of a grant payable by that authority until any declaration required by those rules has been made.

Forfeiture of
pension or
allowance.

8. A pension or allowance under this Act is granted only upon condition that it becomes forfeited, and may be withdrawn by the police authority, in any of the following cases :—

- (a.) if the grantee is convicted of any offence for which he is sentenced to penal servitude or to imprisonment for a term exceeding three months with hard labour, or to imprisonment for a term exceeding twelve months, whether with or without hard labour ; or
- (b.) if the grantee knowingly associates with thieves or reputed thieves ; or
- (c.) if the grantee refuses to give to the police all information and assistance in his power, for the detection of crime, for the apprehension of criminals, and for the suppression of any disturbance of the public peace ; or
- (d.) if the grantee enters into or continues to carry on any business, occupation, or employment which is illegal, or in which he has made use of the fact of his former employment in the police in a manner which the police authority consider to be discreditable and improper.

Such forfeiture and withdrawal may affect the pension wholly or in part, and may be permanent or temporary, as the police authority may determine.

Punishment
for obtaining
pension, &c.,
by fraud.

9. If a person obtains or attempts to obtain for himself or for any other person any pension, gratuity, or allowance under this Act, or any payment on account of any such pension, gratuity, or allowance, by means of any false declaration, false certificate, false representation, false

evidence, or personation, or by malingering or feigning disease or infirmity, or by maiming or injuring himself, or causing himself to be maimed or injured, or otherwise producing disease or infirmity, or by any other fraudulent conduct, he shall be liable on summary conviction to imprisonment with or without hard labour for a term not exceeding four months or to a fine not exceeding twenty-five pounds, to be paid (notwithstanding anything in any charter or in any other Act whether relating to municipal corporations or otherwise) to the pension fund of the force from which he obtained or attempted to obtain the pension, gratuity, or allowance, and on conviction by a jury to imprisonment, with or without hard labour, for a term not exceeding two years, and also in either case, to forfeit any pension, gratuity, or allowance so obtained.

53 & 54 VICT.
c. 45.

Police Act,
1890.

10. Nothing in this Act shall prejudice the existing right of any police authority to dismiss any constable, or to reduce him to any lower rank or lower rate of pay, or shall prevent his claim to pension from being refused on account of misconduct, or of negligence in the discharge of his duties, or on account of any of the grounds on which his pension if granted would be liable to be forfeited and withdrawn.

Saving of
right of dis-
missal and
reduction in
rank.

11. In any of the following cases—

- (a.) where a pension after being granted to a constable has subsequently in pursuance of this Act been declared to have been forfeited, and
- (b.) where a constable is dismissed without a pension to which he would be otherwise entitled, and in any other case where a constable, or the widow or child of a constable, claims a pension or allowance under this Act as of right, and the police authority do not admit the claim,

Appeal in case
of forfeiture,
or refusal of
pension or
allowance.

the constable, widow, or child may apply to the police authority for a reconsideration of the claim to the pension or allowance, and if aggrieved by the decision upon such reconsideration may apply to the next practicable court of quarter sessions for the county within which the constable last served; or if the constable last served in the police force of a borough having a separate police force and a separate court of quarter sessions, then to the next practicable court of quarter sessions for that borough, and that court, after inquiry into the case, may make such order in the matter as appears to the court just, which order shall be final; but nothing in this section shall confer a right to appeal against the exercise of any discretion, or against any decision which is declared by this Act to be final.

12. The provisions of this Act shall apply to a chief officer of police and to the assistant commissioners of the metropolitan police in like manner, so nearly as circumstances admit, as they apply to any other constable, except that, in the case of a chief officer, the certificate of approved service and the sanction to removal from one force to another may be given by a resolution of the police authority, and that nothing in this section shall make any pension which is now payable out of money provided by Parliament payable from any other source.

Application of
Act to chief
officer of
police.

13. (1.) Where a constable in receipt of a pension under this Act from a police authority takes service in any police force, his pension may be suspended by that police authority in whole or in part so long as he remains in that service.

Suspension of
pension in
case of ap-
pointment to
new office.

(2.) If a constable in receipt of a pension under this Act is appointed to an office remunerated out of money provided by Parliament, or out of a county or borough rate or fund, he shall not, while holding that office,

53 & 54 Vict. c. 45. receive more of the pension than together with the remuneration of that office is equal to one and a half times the remuneration of the office in respect of which the pension was awarded.

Police Act,
1890.

Provisions as
to service in
more than
one capacity
—50 & 51
Vict. c. 67.

14. Where a person has served in two or all of the following capacities—

(i.) as a civil servant within the meaning of the Superannuation Act, 1887 ;

(ii.) in a police force with a salary paid out of the police fund ;

(iii.) in a police force with a salary paid out of money provided by Parliament ;

he shall be entitled to reckon his entire period of service in both or all capacities for the purpose of pension, and the pension shall be on the scale and subject to the statutory requirements affecting pensions in the service from which he last retires.

Provided as follows ;

(1.) For the purposes of the pension three years of police service shall be reckoned as equivalent to four years of service as a civil servant, and conversely ; and

(2.) The pension shall be payable from money provided by Parliament, and from the police pension fund in such proportions as the Treasury may determine, regard being had to the period of service and the salary received in each capacity.

Rateable
deductions
from pay to
be carried to
pension fund.

15. (1.) The police authority of every police force shall deduct from the pay of every constable in the force—

(a.) sums at a rate not exceeding two and a half per cent. per annum on his pay (in this Act referred to as the rateable deduction) ; and

(b.) such stoppages during sickness, and such fines for misconduct, as may be provided by the regulations respecting the force.

(2.) Where a constable has removed to some other force or forces with the written sanction of the chief officer of any force he has removed from, and such constable in due course becomes entitled to and is awarded a pension, the police authority in whose service he then is shall be entitled to call upon the other police authority or authorities with whom he shall have served approved service, and they shall contribute a proportionate part of any pension to such constable reckoned according to the approved service and pay of such constable during his service in such force, and the said proportionate part shall be settled by agreement between the police authorities, or in default of agreement, by an arbitrator appointed by the Secretary of State.

Establish-
ment of
pension fund,
and fines,
fees, &c., to
be carried to
fund—
85 & 36 Vict.
c. 94—
37 & 38 Vict.
c. 49.

16. (1.) There shall be a pension fund of every police force, and there shall be carried to that fund—

(a.) the deductions (including stoppages and fines) made in pursuance of this Act from the pay of the constables in the force ; and

(b.) the fines imposed by a court of summary jurisdiction, when imposed on constables in the force, or for assaults on constables in the force, and the fines or portions of fines imposed by a court of summary jurisdiction for other offences, and awarded to informers being constables in the force ; and

(c.) such fines or portions of fines, and such fees payable to or received by constables, as by any Act are directed or authorised to be carried to the superannuation fund or pension fund of the police force ; and

(d.) the net sums arising from the sale of worn or cast clothing supplied for the use of the constables of the force ; and

- (e.) such proportion of any sum received on account of constables whose services have been lent in consideration of payment as the police authority may consider to be a fair contribution to the pension fund in respect of those constables; and
- (f.) any payments or contributions payable under the provisions of any local and personal Act to the pension or superannuation fund of any police force, whether out of any fund, rate or account under the control of the police authority, or payable by any other authority, board, or persons; and
- (g.) all dividends and other annual sums received in respect of the investments of the pension fund.
- (2.) Unless the authority having control of the funds to which the sums hereinafter mentioned would but for this section be carried otherwise resolve, and except so far as the said sums are subject to the foregoing provisions of this section, there shall also be carried to the pension fund of every police force the following sums, namely:
- (h.) The net sums received in the police area for pedlars and chimney sweepers certificates; and
- (i.) All fees payable to or received by any constable of the force in the execution of his duty as such or in the execution of any other duty which may be required to be performed by any constable of the force; and
- (k.) The fines imposed by a court of summary jurisdiction for offences under the Licensing Acts, 1872 and 1874, when committed within the police area or for any offence under a general or local Act similar to any of the above offences.
- (3.) The police authority may also direct any sums under the control of the police authority in that capacity, or under the control of the police force, or of any member thereof in that capacity, to be carried to the pension fund, provided that this direction shall not be given in the case of any fund held on a private trust.
- (4.) Any resolution passed for the purposes of this section may be revoked or varied.
- (5.) The provisions of this section shall have effect notwithstanding anything in any charter or in any other Act, whether relating to municipal corporations or otherwise.
17. (1.) Any annual sum which under an Act passed in the present session relating to the distribution of certain duties of Customs and Excise required to be distributed among the police authorities of the police forces in England and Wales, other than the Metropolitan police force (which sum is in this Act referred to as the Exchequer contribution), shall be distributed according to the following basis of distribution, that is to say:—
- (a.) There shall be paid in every financial year to the police authority of every such police force a sum equal to the amount of the rateable deductions made during the year ending the twenty-ninth day of September last preceding the end of the financial year from the pay of the constables belonging to that force, and that sum shall be carried to the pension fund.
- (b.) The residue shall at the same time be distributed among the police authorities of those forces in proportion to the amounts paid during the year ending the twenty-ninth day of September last preceding the end of the financial year in respect of pensions, allowances, and gratuities out of their pension funds respectively,

53 & 54 Vict.
c. 45.

Police Act,
1890.

Distribution
of sums
granted out
of Customs
and Excise
duties for
police super-
annuation.

53 & 54 Vict.
c. 45.

Police Act,
1890.

and the proportion to be paid to each force shall be carried to the pension fund.

(2.) Provided that a police authority shall not in respect of any year receive any payment under this section unless the Secretary of State gives a certificate that the management and efficiency of the police force under that authority and the administration of the pension fund of that force have during that year been satisfactory; and, if the Secretary of State withholds that certificate as regards any police authority, the amount which would otherwise be payable to that authority under this section shall be forfeited to the Crown and paid into the Exchequer.

(3.) Before any such certificate is finally withheld in respect of any police force, the Secretary of State shall communicate with the police authority of the force, and that authority may address any statement on the subject to the Secretary of State; and in every case in which the certificate is withheld a statement of the grounds on which the Secretary of State has withheld his certificate, together with any such statement of the police authority, shall be laid before Parliament.

(4.) The sums to be paid to each police authority under this section shall be certified by the Secretary of State, who may, if he thinks proper, vary his certificate, but unless it is so varied his certificate shall be conclusive.

(5.) Where owing to any special circumstances affecting any particular police force the sum payable to that force under the foregoing provisions of this section would, in the opinion of the Secretary of State, be inequitable as between that force and some other force or forces, the Secretary of State may make such modification in the basis of distribution as appears to him to be necessary to meet the equities of the case.

(6.) The basis of distribution under this section may also be varied in such manner and in accordance with such conditions as may from time to time be set forth in regulations made by the Secretary of State and submitted to Parliament. All such regulations shall be laid on the table of both Houses of Parliament, and shall not come into operation until they have lain on the table of each house for not less than thirty days on which that House has sat.

(7.) This section shall come into operation on the passing of this Act.

Accounts and
investment of
pension fund.

18. (1.) All sums which, in pursuance of this Act, are to be carried to the pension fund of a police force shall be accounted for and paid to the treasurer of that fund in such manner as the police authority may direct, and may be dealt with as annual income of the pension fund.

(2.) The pension fund of a police force shall be kept as a separate fund, but the treasurer of the police fund shall be the treasurer of the pension fund, and all enactments and regulations relating to the accounts of the police fund, and to the making up, audit, and publication thereof, and to the power of disallowance and otherwise shall, so nearly as circumstances admit, apply to the pension fund.

(3.) At the end of each financial year the surplus of the annual income of the pension fund above the expenditure thereout shall, as soon as may be, be invested in such name as the police authority direct, and in any manner authorised by law for investments by trustees, and all investments on account of the fund, under this section or otherwise, are in this Act referred to as the capital of the pension fund.

(4.) The capital of the pension fund shall not be applied for paying any sums payable out of that fund.

19. (1.) If at any time the annual income of the pension fund is insufficient to pay the expenses of managing the fund, and the pensions, allowances, gratuities, and other sums payable thereout, the deficiency shall be supplied out of the police fund. 58 & 54 Vict. c. 45.

(2.) In the case of a county divided into districts within the meaning of section twenty-seven of the County Police Act, 1840, as amended by section four of the County and Borough Police Act, 1856, the deficiency shall be supplied by the several districts, as part of the local expenditure thereof, rateably in proportion to the number of constables appointed for each such district. Police Act, 1890.

(3.) Where the police force of a borough has been consolidated with the police force of a county, the deficiency shall be supplied out of the police funds of the county and borough respectively in accordance with an agreement between the police authorities for the county and borough made in the same manner and subject to the same conditions as an agreement to consolidate the police force of a borough with the police force of a county can be made, and in default of any such agreement shall be supplied in such manner as may be determined by an arbitrator appointed by the Secretary of State. Guarantee of pension fund by police fund — 3 & 4 Vict. c. 88 — 19 & 20 Vict. c. 69.

(4.) Where the rate which can be levied for the police fund is limited, an addition to that rate may be levied for the purpose of raising the sum required to supply the deficiency.

20. (1.) Every police authority may make regulations consistent with this Act with respect to the deductions from a constable's service for sickness, misconduct, or neglect of duty, and with respect to stoppages of pay during sickness and fines for misconduct, and with respect to the mode in which pensions are to be paid, and otherwise for the purpose of giving effect to the provisions of this Act. Power for police authority to make regulations.

(2.) All regulations for a police force made before the commencement of this Act with respect to any of the above matters shall have effect as if made under the powers given by this section.

21. If a constable not having been dismissed leaves a police force without a pension or gratuity, the police authority may, if it seems to them just, pay him the whole or part of the rateable deductions which have been made from his pay; but this section shall not apply in the case of his being removed to another force under such circumstances as will enable him to reckon his approved service in the force from which he removes. Power to return rateable deductions on leaving force.

22. (1.) Where it appears to a police authority that the assets of their pension fund exceed the amount required for meeting the liabilities thereon, and that it is expedient to provide for the application of the excess or any part thereof, the police authority may apply to the Secretary of State, and thereupon the Secretary of State may frame and submit to Parliament for confirmation a provisional order authorising the payment out of the pension fund of such sums, for such purposes, during such period, and subject to such conditions as may seem expedient. Provisional orders by Secretary of State.

(2.) Where it appears to a police authority that by reason of their pension fund being sufficient to meet the liabilities thereon it is unnecessary to make any further investments on account of the capital thereof, the police authority may apply to the Secretary of State, and thereupon the Secretary of State may frame and submit to Parliament for confirmation a provisional order authorising the discontinuance of those investments.

(3.) Where a local Act provides for the payment to members of a special force in any police area of the same pension, superannuation, or other allowances or gratuities as are by that local Act provided for the

53 & 54 Vict. police force of the area, the Authority controlling the special force may
c. 45. apply to the Secretary of State, and thereupon the Secretary of State may
Police Act, frame and submit to Parliament for confirmation a provisional order
1890. providing—

- (i.) for the adjustment of any financial relations existing at the commencement of this Act between the police force and the special force as regards the payment of pensions, allowances, and gratuities to members of those forces respectively; and
 - (ii.) for applying with or without modification all or any of the provisions of this Act to the special force.
- (4.) A provisional order under this section shall be of no force unless and until it is confirmed by Act of Parliament, but when so confirmed shall have effect with any modifications made therein by Parliament.
- (5.) If, while the Bill confirming any such order is pending in either House of Parliament, a petition is presented against any order comprised therein, the Bill so far as it relates to that order, may be referred to a Select Committee, and the petitioner shall be allowed to appear and oppose as in the case of private Bills.
- (6.) All costs, charges and expenses incurred by the Secretary of State in relation to any order under this section shall be defrayed by the authority applying for the order.
- (7.) For the purposes of this section the expression "special force" means a fire brigade, fire police, or other like force.

PART II.

General Amendment of Acts.

Table of fees. 23. (1.) Every police authority may from time to time, and shall at least once in every five years, submit for approval to a Secretary of State a table of fees payable to constables in respect of the service of summonses, the execution of warrants, and the performance of other occasional duties which may be required of the constables under that authority, and in respect of the performance of any other act done by constables in the execution of their duty, and the Secretary of State may approve of the table with or without modification.

(2.) Every police authority shall also provide for those fees being duly accounted for and being duly paid to the treasurer of that authority, and those fees shall, subject to the provisions of this Act, be applied in manner provided by the enactments relating to the police force of that authority, and so far as those enactments do not extend, then in aid of the police fund of that authority.

(3.) A constable may receive any fee mentioned in a table for the time being approved not more than five years previously by a Secretary of State, but no other fee shall be taken by a constable for any service performed by him.

(4.) Every constable shall duly account in accordance with the provisions made as above mentioned for any fee taken by him.

24. So much of the County and Borough Police Act, 1859, as limits the amount of the gratuity which may be granted as a reward for a meritorious act done by a constable in the execution of his duty is hereby repealed.

25. (1) Where a police authority deem it expedient for any special emergency or under any exceptional circumstances to strengthen their police force (in this section referred to as the aided force) by constables

Amendment
of 22 & 23
Vict. c. 32,
s. 24, as to
amount of
gratuity.
Assistance by
one police
force to
another.

belonging to another police force, such number of constables belonging to the latter force may be added to the aided force, and for such period as may be agreed on between the police authorities of the forces; and the constables so added, notwithstanding that they have not been sworn in or taken any declaration as constables of the aided force, shall, during that period, be deemed, save as otherwise provided by the agreement, to be for all purposes constables of the aided force, and shall have the like powers, duties, and privileges.

53 & 54 Vict.
c. 45.

Police Act,
1890.

(2.) The agreement may be made for a particular occasion, or as a standing agreement, and with reference either to recurring or to unforeseen events, or otherwise, as may be thought expedient,

(3.) Any power conferred on a police authority by this section or by any agreement made thereunder may (subject to anything in the agreement to the contrary) be delegated by that authority to their chief officer of police by any general or special order, and with or without any exceptions, restrictions, or conditions.

(4.) An agreement under this section may contain such terms as to the command of the constables added to the aided force, and as to the expenses (including the pay and allowances of the constables so added and provision for pensions, gratuities, and allowances in the event of those constables being killed or injured) and otherwise, as may seem expedient.

(5.) An agreement may be made by a police authority with more police authorities than one.

26. A police authority may require every constable at the time of his appointment to appear before a justice of the peace, and make and sign a declaration as to his previous service in a police force or public employment; in the form contained in the Second Schedule to this Act, or to the like effect; and if any constable knowingly makes a false declaration, he shall be liable, on summary conviction, to be imprisoned, with or without hard labour, for any period not exceeding three months.

Declaration
by constables
respecting
previous
service.

27. Whereas the annual value of property on which contributions for the purposes of the metropolitan police force are calculated is required to be computed according to the last valuation for the time being acted upon in assessing the county rate, and in some cases since the passing of the Local Government Act, 1888, there may be no such valuation: Be it therefore enacted that in the case of any area for which there is no such valuation, the valuation for the purpose of the said computation shall be such as is from time to time agreed upon between the receiver for the metropolitan police district and the rating authority, whether overseers or others, of the said area, or in default of agreement, as may be determined by arbitration of the Local Government Board, and the provisions of the Local Government Act, 1888, respecting the determination of differences by arbitration of the Local Government Board shall apply accordingly.

Computation
of annual
value in
certain cases
for the pur-
pose of the
metropolitan
police.

In the case of any contribution made or required before the commencement of this Act, the receiver and rating authority may agree to adjust the amount according to any valuation made in pursuance of this section, or such other valuation as they may agree under all the circumstances to be just.

28. (1.) Where in pursuance of the Act of the session held in the first and second years of King William the Fourth, chapter forty-one intituled "An Act for amending the laws relative to the appointment of special constables, and for the better preservation of the peace," a special constable is appointed by a justice or justices exercising jurisdiction in any part of the metropolitan police district, he shall have all the powers of a

Provision as
to special
constables.

53 & 54 Vict. constable throughout the whole of the metropolitan police district and the city of London, and the provisions of that Act shall apply to him as if

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1890.

the metropolitan police district were one county; and the allowances and expenses mentioned in section thirteen of that Act may, if the Secretary of State so directs, be paid out of the metropolitan police fund.

(2.) Where in pursuance of the same Act a special constable is appointed by a justice or justices having jurisdiction in the city of London, he shall have the powers of a constable throughout the whole of the metropolitan police district.

Provision as
to receiver of
metropolitan
police district.

29. It shall not be necessary for the receiver for the time being of the metropolitan police district to give security for the faithful performance of his duty, and any security already given for this purpose shall cease to be in force.

PART III.

Temporary and Supplemental Provisions.

Application of
Act to exist-
ing funds and
constables.

30. For the purpose of adapting the provisions of Part One of this Act to existing pension or superannuation funds and existing constables (that is to say, to constables appointed to police forces, and to the pension or superannuation funds established for those forces, before the commencement of this Act, whether under any general or local Act, or otherwise) the following provisions shall have effect:

- (1.) As soon as may be after the commencement of this Act, the amount of every existing pension or superannuation fund of a police force shall, where it is not already held by the treasurer of the police fund of that force, be transferred by the persons holding the same to such persons as the police authority may direct, to be held and dealt with as part of the pension fund under this Act, and as part of the capital or income thereof, as the case may require:
- (2.) Where Exchequer contribution to the police authority of a police force becomes payable before any existing fund of the force which is required to be so transferred is so transferred, or, in the case of a police force not having any such fund, before a pension fund is established for the force in pursuance of this Act, the payment of the contribution shall be deferred until the Secretary of State has certified that the fund is so transferred or established:
- (3.) Where the police force of a borough has been consolidated with the police force of a county, and the existing pension or superannuation fund of the police force of the borough has not been transferred to the county treasurer, that fund shall be transferred in accordance with the foregoing provisions of this section, as soon as may be after the commencement of this Act, by the persons holding the same, and, in the absence of any agreement between the police authorities for the county and borough, the income of that fund shall be applied in paying the superannuation and other allowances charged thereon at the date of the transfer, and, subject thereto, in paying the pensions, allowances, and gratuities to constables employed in the consolidated force, and their widows and children, in such manner as may be determined by an arbitrator appointed by the Secretary of State:
- (4.) In Lincolnshire section twenty-two of the County and Borough Police Act, 1859, and sections six, seven and eight of the Police Superannuation Act, 1865, as amended by the Lincolnshire Police

Superannuation Act, 1888, shall, so far as is consistent with the tenor thereof, apply to the pension fund under this Act in like manner as if it were the superannuation fund in those sections mentioned :

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- (5.) Every police authority shall, within fourteen days after a pension scale has been adopted by or framed for the police authority in pursuance of this Act, cause written notice to be given to every constable in the police under that authority, requiring him to inform that authority in writing before the date of the commencement of this Act, whether he does or does not accept the provisions of this Act in lieu of the existing enactments respecting superannuation :
- (6.) This Act shall not apply to any existing constable who, before the date of the commencement of this Act, whether any such notice has or has not been given to him, declines in writing to accept the provisions of this Act ; but save as aforesaid this Act shall apply to all existing constables ; and those constables shall be deemed to have surrendered in favour of the police authority all right to any provision made before the commencement of this Act, either wholly or partly, by the police authority for the superannuation of such constables, or, in case of their death, for their widows and children or any of them, whether that provision is made by an annual allowance, insurance, or otherwise :
- (7.) If by reason of the police authority not having given such notice as aforesaid an existing constable becomes entitled to a less pension than he would have been entitled to receive if this Act had not passed, he may apply to the police authority, and the police authority may make such order as may seem just for the purpose of preventing the constable from suffering any loss by reason of the notice not having been given :
- (8.) In the case of any existing constable to whom this Act applies, his approved service for any period before the commencement of this Act in the force in which he is serving at the time of his retirement shall be reckoned as approved service : and his service for not less than three years either wholly or partly before the commencement of this Act in any police force in any part of the United Kingdom from which he removed with the sanction of the chief officer or police authority of that force to another force, shall (notwithstanding the sanction was not given in writing) be reckoned as approved service for the said period in the last-mentioned force, unless the police authority who give him the notice respecting the acceptance of this Act, inform him in writing at the time of such notice that they refuse to allow the said service to be reckoned, but their refusal shall not prevent the reckoning of that service under any other provision of this section :
- (9.) Any description of service before the commencement of this Act, either in a police force or otherwise, which any existing constable to whom this Act applies is at the commencement of this Act entitled to reckon as service for any period towards superannuation out of the existing pension or superannuation fund of his police force, and which is not reckoned under any other provision of this Act, shall be reckoned for the same period for the purposes of pension under this Act : In the case of any existing constable

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to whom this Act applies, who has served not less than ten years before the commencement of this Act in a police force in which the police authority have heretofore, under the provisions of former Acts, granted pensions of higher amount than authorised by the scale adopted by that police authority under the provisions of this Act, and who becomes entitled to a pension under this Act, then, notwithstanding anything in this Act, the pension may, if the police authority think fit, exceed the amount prescribed in the adopted scale so as it does not exceed the amount which might have been granted if this Act had not passed :

- (10.) Provided that if, in the case of an existing constable, rateable deductions or other payments towards superannuation or insurance have not, during the period of the service which he is entitled to reckon for the purpose of calculating his pension under this Act, or for some part of such period not less than ten years, been made, and contributions have not been made from other sources to a superannuation fund in lieu of the rateable deductions not so made, the pension granted under this Act to such constable may, if the police authority think fit, be reduced by an annual amount equal to such deferred annuity as could, according to the tables for the purchase of deferred annuities from the Commissioners for the Reduction of the National Debt through the medium of the Post Office, have been purchased by rateable deductions made at the rate fixed under this Act during the said period of service, or the part thereof during which such deductions or payments were not made.

Act to super-
sede local
Acts.
Application of
Act to metro-
politan police
—22 Vict.
c. 26—38 & 39
Vict. c. 38.

81. The provisions of this Act shall have effect, notwithstanding anything in any other Act, general or local, to the contrary.

82. This Act shall apply to the metropolitan police force, subject as follows :—

- (1.) Anything authorised or required to be done by a resolution or other act of the police authority may be done by any instrument signed by a Secretary of State :
- (2.) Anything authorised or required to be done with the approval of a Secretary of State, or by a Secretary of State on the submission or application of a police authority, may be done by a Secretary of State alone :
- (3.) The court of quarter sessions to which an application is to be made with respect to a decision as to a pension or allowance shall be the court of quarter sessions for the county of London :
- (4.) Nothing in this Act shall apply to any existing constable who acted as one of the police of any of Her Majesty's dockyards, and upon his transfer to the metropolitan police force did not accept the terms of superannuation of members of that force, or agree to allow the deductions to be made from his pay which have been made towards such superannuation from the pay of other members of that force ; and any such constable shall be entitled to superannuation under the Superannuation Act, 1859, notwithstanding that he obtained no certificate from the Civil Service Commissioners :
- (5.) The rate and conditions of pension of the chief commissioner of metropolitan police, and of the assistant commissioners of metropolitan police shall be regulated by the provisions of this Act, and not by the provisions of the Metropolitan Police Staff (Super-

annuation Act, 1875, but the said chief commissioner and assistant commissioners shall be entitled to pension under the provisions of this Act in respect of any emoluments in respect of which they are entitled to a superannuation allowance made under the Metropolitan Police Staff (Superannuation) Act, 1875." 53 & 54 Vict. c. 45.
Police Act, 1890.

- (6.) The rateable deductions from the salary of the chief commissioner of metropolitan police and from the salaries of such of the assistant commissioners of metropolitan police as receive salaries from money provided by Parliament shall be paid into the Exchequer and not to the pension fund.
- (7.) The existing chief commissioner and assistant commissioners of metropolitan police shall be deemed existing constables within the meaning of this Act.

33. In this Act, unless the context otherwise requires—

The expression "police area" means one of the areas set forth in the first column of the Third Schedule to this Act; and the expressions "police authority," "chief officer of police," and "police fund," mean, as respects each police area, the authority, officer, and fund respectively mentioned opposite to that area in the second, third, and fourth columns of that schedule; and the expression "police force" means a force maintained by one of the police authorities mentioned in the said schedule:

Police areas and authorities.

Provided as follows:

- (1.) In the case of a county the powers of the police authority under this Act with respect to the accounting for and payment of sums to be carried to the pension fund or police fund, and with respect to investments, shall be exercised by the county council, and any sum payable under this Act by the police authority shall be payable by the county council on the requisition of the standing joint committee of the quarter sessions and the county council;
- (2.) Any contributions required to meet payments out of the county fund for the purposes of this Act shall be assessed in like manner as contributions to meet the expenses of the police force;
- (3.) The exercise of the powers conferred by this Act on the watch committee of a borough shall be subject to the approbation of the council of the borough.

34. In this Act, unless the context otherwise requires—

The expression "treasurer" includes any receiver, chamberlain, or other officer, by whatever name known, who performs the duties of treasurer in relation to any police fund:

Definitions.

The expression "fine" includes a pecuniary penalty:

The expression "fee" does not include any reward paid to an individual constable by direction of the Admiralty, or of any military authority, or of a Secretary of State not acting as the police authority, or any gratuity paid to a constable for a meritorious act done in the execution of his duty.

35. Notwithstanding anything in this Act or in any repeal by this Act every person in receipt of any pension, superannuation, or other allowance at the commencement of this Act shall continue to be entitled to receive the same, subject to the same limitations and conditions as before the commencement of this Act, and the same shall not be altered under this Act, and shall, save as otherwise expressly provided by this Act, be paid out of the like funds, as nearly as they may, as if this Act had not passed. Saving for existing pensions.

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c. 45.

Police Act,
1890.

Repeal.

36. The Acts mentioned in the Fourth Schedule to this Act are hereby repealed to the extent in the third column of that schedule mentioned, and so much of any other Act as regulates the superannuation of any police force in England and Wales, or is inconsistent with this Act, is also hereby repealed.

Provided that—

- (1.) This repeal shall not affect the right of any police authority to grant any pension or superannuation or other allowance or gratuity to any existing constable to whom this Act does not apply, or to the widow and child of any such constable, or either of them, and shall not affect the right of any such constable, widow, or child to claim such pension, or superannuation or other allowance or gratuity, and any such pension, allowance, or gratuity may be granted and claimed accordingly, and the claim shall be allowed as if this Act had not passed, but the pension, allowance or gratuity shall be paid out of the pension fund :
- (2.) This appeal shall not prevent any constable from reckoning as approved service any service which he is entitled under any enactment hereby repealed to reckon towards pension or superannuation :
- (3.) Any table of fees made in pursuance of any enactment hereby repealed shall continue in force in like manner as if it had been at the date of the commencement of this Act approved by the Secretary of State in pursuance of this Act,
- (4.) Nothing in this section shall repeal any enactment so far as it relates to any fire brigade, fire police, or other force to which or to the members whereof the provisions of this Act do not apply.

Commence-
ment of Act.

37. This Act shall come into operation on the first day of April one thousand eight hundred and ninety-one, except as to anything which is by this Act required or authorised to be done before that date, and except as to any provision which is expressed to come into operation on the passing of this Act.

Short titles.

38. (1.) This Act may be cited as "The Police Act, 1890."

(2.) The Acts mentioned in the Fifth Schedule to this Act are in this Act referred to and may be cited by the short titles respectively in that schedule mentioned, and may be cited collectively by the short title at the commencement of that schedule mentioned.

(3.) The Metropolitan Police Acts, 1829 to 1887, and this Act may be cited together as "The Metropolitan Police Acts, 1829 to 1890."

(4.) The Acts mentioned in the said Fifth Schedule and this Act may be cited together as "The Police Acts, 1839 to 1890."

Act not to
apply to City.
Extent of Act.

39. This Act shall not apply to the City of London Police.

40. This Act shall not extend to Scotland or Ireland.

FIRST SCHEDULE.

PENSION SCALE.—PART I.

Ordinary Pensions.

- (1.) The pension to a constable on retirement shall be within the maximum and minimum limits following; that is to say,
 - (a.) if he has completed fifteen but less than twenty-one years approved service, an annual sum not less than one-sixtieth nor more than one-fiftieth of his annual pay for every completed year of approved service; and
 - (b.) if he has completed twenty-one but less than twenty-five years approved service,

an annual sum not less than twenty-sixtieths nor more than twenty-fiftieths of his annual pay, with an addition of not less than two-sixtieths and not more than two-fiftieths of his annual pay for every completed year of approved service above twenty years; and

- (c.) if he has completed twenty-five years approved service, an annual sum not less than thirty-sixtieths nor more than thirty-one fiftieths of his annual pay, with an addition of not less than one-sixtieth nor more than three-fiftieths of his annual pay for every completed year of approved service above twenty-five years, so however that the pension shall not exceed two-thirds of his annual pay.
- (2.) Where a limit of age is fixed below which a constable is not to be entitled to retire on a pension without a medical certificate, it shall be not less than fifty years and not more than fifty-five years, or in the case of a constable above the rank of sergeant, not more than sixty years, but it shall not be obligatory on a police authority to fix any such limit.

53 & 54 VICT.
c. 45.
Police Act,
1890.

PART II.

Maximum of Gratuity to Constable.

- (3.) Any gratuity on retirement to a constable who is incapacitated for the performance of his duty shall not exceed the amount of one month's pay for every completed year of approved service.

Special Pensions.

- (4.) The pension to a constable who is incapacitated for the performance of his duty by infirmity of mind or body occasioned by an injury received in the execution of his duty without his own default, shall vary according as the injury is or is not accidental, and according as the constable is partially or totally disabled from earning his livelihood.

- (5.) The amount of pension in such cases shall be in the discretion of the police authority, but within the maximum and minimum limits following:—

Scale A.

If the injury is accidental and the constable is partially disabled—

- (a.) if he has completed not more than five years approved service, an annual sum not greater than ten-fiftieths and not less than ten-sixtieths of his annual pay;
- (b.) if he has completed more than five and not more than ten years approved service, an annual sum not greater than twelve-fiftieths and not less than twelve-sixtieths of his annual pay;
- (c.) if he has completed more than ten and not more than fifteen years approved service, an annual sum not greater than fifteen-fiftieths and not less than fifteen-sixtieths of his annual pay; and
- (d.) if he has completed more than fifteen years approved service, an annual sum not greater than the maximum pension and not less than the minimum pension authorised under Article (1) of this schedule.

Scale B.

If the injury is accidental and the constable is totally disabled—

- (a.) if he has completed not more than ten years approved service, an annual sum not greater than fifteen-fiftieths and not less than fifteen-sixtieths of his annual pay;
- (b.) if he has completed more than ten and not more than fifteen years' approved service, an annual sum not greater than twenty-fiftieths and not less than twenty-sixtieths of his annual pay;
- (c.) if he has completed more than fifteen years approved service, an annual sum not greater than the maximum pension authorised under Article (1) of this schedule, with an addition equal to five-fiftieths of his annual pay, and not less than the minimum pension authorised under the same Article, with an addition equal to five-sixtieths of his annual pay, provided that the pension shall not exceed two-thirds of his annual pay.

Scale C.

If the injury is not accidental and the constable is partially disabled—

- (a.) if he has completed not more than ten years approved service, an annual sum not greater than twenty-fiftieths and not less than twenty-sixtieths of his annual pay;
- (b.) if he has completed more than ten and not more than fifteen years approved

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c. 45.

Police Act,
1890.

- service, an annual sum not greater than twenty-five fiftieths and not less than twenty-five sixtieths of his annual pay;
- (c.) if he has completed more than fifteen years approved service, an annual sum not greater than the maximum pension authorised under Article (1) of this schedule, with an addition equal to ten-fiftieths of his annual pay, and not less than the minimum pension authorised under the same Article, with an addition equal to ten-sixtieths of his annual pay, provided that the pension shall not exceed two-thirds of his annual pay.

Scale D.

If the injury is not accidental and the constable is totally disabled—

A sum not exceeding full pay and not less than the maximum amount prescribed by Scale C.

Pensions, Allowances, and Gratuities to Widow and Children.

(6.) Where a constable without his own default loses his life from the effect of an injury received in the execution of his duty, the pension to his widow and the allowances to his children shall be according to the following scale:

- (a.) The pension to the widow shall be an annual sum of twenty-five pounds;
- (b.) The allowance to each child shall be an annual sum of two pounds ten shillings.

Provided that the police authority may, in the case of a constable of a rank higher than that of sergeant, increase the above amounts, so however that the pension for a widow of an inspector do not exceed the annual sum of twenty-five pounds, and the pension for a widow of an officer of a rank higher than that of inspector do not exceed thirty pounds, and the allowance for a child of a constable of a rank higher than that of sergeant do not exceed the annual sum of five pounds.

(7.) Where a constable dies under circumstances which do not entitle his widow and children to a pension or allowance under the preceding article of this schedule, any gratuities to the widow and children shall not exceed in the whole the amount of one month's pay for every completed year of approved service of the deceased constable.

(8.) The gratuities granted to the widow and children of a constable who dies within twelve months after the grant of a pension shall not exceed in the whole the difference between the annual pay of the constable and the amount he has actually received in respect of his pension.

PART III.

GENERAL RULES.

(9.) The pension to a widow shall continue only while she remains a widow and is of good character.

(10.) The allowance to a child shall not continue after the child attains the age of fifteen years.

(11.) In estimating any pension, gratuity, or allowance for the purposes of this Act—

- (a) a pension or gratuity to a constable shall be calculated according to the amount of his annual pay at the date of his retirement;
- (b) a pension or gratuity to the widow and an allowance or gratuity to a child of a constable shall be calculated according to the amount of the constable's annual pay at the date of his death;
- (c) but where a constable has, in the course of the three years next before the date of his retirement or death, been in more than one rank, his annual pay at the date of the retirement or death shall be deemed to be the average annual amount of pay received by him for the said three years, instead of the annual amount actually received by him at that date.

SECOND SCHEDULE (Section 26).

DECLARATION.

I, *A.B.*, now residing in the parish of _____ in the county of _____,
, solemnly and sincerely declare that I have*
never served in any police force in Great Britain, nor in the Royal Irish Constabulary,

* Insert according to the circumstances.

nor in the Royal Navy, nor in Her Majesty's Army, nor in the Militia, nor under the 53 & 54 Vict. c. 45.
 Post Office, nor under any public department
 [or that I have served in the police force for years,
 from to , and in Her Majesty's Army and Police Act,
 for years from to 1890.
 am now in the Army Reserve, but have not served in the Royal Irish Constabulary nor
 in the Royal Navy, nor in the Militia, nor under the Post Office, nor under any public
 department, or as the case may be].

Declared before me.

(Signed) A.B.

At the day of 18 .

THIRD SCHEDULE.

POLICE AREAS AND AUTHORITIES (Section 83).

Police Area.	Police Authority.	Chief Officer of Police.	Police Fund.
The Metropolitan Police District.	One of Her Majesty's Principal Secretaries of State.	The commissioner of police of the metropolis	The fund applicable for defraying the expenses of the metropolitan police force.
A county.	The standing joint committee of the quarter sessions and the county council.	The chief constable.	The county fund.
A borough.	The watch committee.	The chief or head constable.	The borough fund or borough rate or any fund or rate applicable under any local Act for the expenses of the police force.
A town not being a borough and maintaining a separate police force under any local Act of Parliament.	The authority having the management of the police under the local Act.	The head constable or other officer by whatever name called having the chief command of the police.	The fund or rate applicable under the local Act for the expenses of the police force.
The river Tyne within the limits of the Acts relating to the Tyne Improvement Commissioners.	The Tyne Improvement Commissioners.	The superintendent or other officer having the chief command of the police.	The tonnage rates and dues and other sums applicable under the Acts relating to the improvement of the river Tyne for the expenses of maintaining the police force.

In this schedule the expression "county" means an administrative county within the meaning of the Local Government Act, 1888, but does not include a county borough.

Such parts of any county as are within the Metropolitan Police District, or as form part of any other police area, shall not be deemed for the purposes of this Act to form part of the county police area.

53 & 54 Vict.
c. 45.

Police Act,
1890.

FOURTH SCHEDULE.

ACTS REPEALED (Section 36).

Session and Chapter.	Title or Short Title.	Extent of repeal.
10 Geo. 4, c. 44.	An Act for improving the police in and near the metropolis.	In section ten, from "and the receiver for the time being," where those words first occur, to "paid to him under this Act."
2 & 3 Vict. c. 47.	The Metropolitan Police Act, 1839.	Sections twenty-two and twenty-three.
2 & 3 Vict. c. 71.	An Act for regulating the police courts in the metropolis.	In section forty-six, the words "which shall be applied towards defraying the charge of maintaining the police of the metropolis."
3 & 4 Vict. c. 88.	An Act to amend an Act for the establishment of county and district constables.	Sections ten, eleven, and seventeen.
19 & 20 Vict. c. 69.	An Act to render more effectual the police in counties and boroughs in England and Wales.	Sections eight, ten, eleven, thirteen, twenty-seven, twenty-eight, and twenty-nine.
20 & 21 Vict. c. 64.	The Metropolitan Police Act, 1857.	Section fifteen.
22 & 23 Vict. c. 32.	An Act to amend the law concerning the police in counties and boroughs in England and Wales.	Sections eight, nine, ten, twelve, thirteen, fifteen, sixteen, seventeen, nineteen, twenty, twenty-one, twenty-three, and twenty-eight, and in section twenty-four, the words "not exceeding three pounds."
24 & 25 Vict. c. 124.	The Metropolitan Police Act, 1861.	Section six.
28 & 29 Vict. c. 35.	The Police Superannuation Act, 1865.	Section two, except so far as it relates to the County and Borough Police Act, 1859; and sections three, four, five, and nine.
45 & 46 Vict. c. 50.	The Municipal Corporations Act, 1882.	Fifth Schedule, Part II., 5 (b) from "or as may be awarded," down to "length of service."

FIFTH SCHEDULE.

THE POLICE (ENGLAND) ACTS (Section 38).

Session and Chapter.	Title.	Short Title.
2 & 3 Vict. c. 98.	An Act for the establishment of county and district constables by the authority of justices of the peace.	County Police Act, 1839.
3 & 4 Vict. c. 88.	An Act to amend the Act for the establishment of county and district constables.	County Police Act, 1840.
19 & 20 Vict. c. 69.	An Act to render more effectual the police in counties and boroughs in England and Wales.	County and Borough Police Act, 1856.

FIFTH SCHEDULE—*Continued.*
THE POLICE (ENGLAND) ACTS (Section 88).

53 & 54 VICT.
c. 45.

Police Act.
1890.

Session and Chapter.	Title.	Short title.
20 Vict. c. 2.	An Act to facilitate the appointment of chief constables for adjoining counties, and to confirm appointments of chief constables in certain cases.	County Police Act, 1857.
22 & 23 Vict. c. 82.	An Act to amend the law concerning the police in counties and boroughs in England and Wales.	County and Borough Police Act, 1859.
28 & 29 Vict. c. 35.	An Act to amend the law relating to the police superannuation funds in counties and boroughs.	Police Superannuation Act, 1865.

45 & 46 Vict. c. 50.—Sections one hundred and ninety to one hundred and ninety-four (both inclusive) of the Municipal Corporations Act, 1882, (a) shall for the purpose of this Act be deemed to form part of the Acts in this schedule.

BANKRUPTCY ACT, 1890.

53 & 54 VICT. CAP. 71.

An Act to amend the Law of Bankruptcy.—[18th August, 1890.]

26. Section eleven of the Debtors Act, 1869, (b) shall have effect as if there were substituted therein for the words "if within four months next before the presentation of a bankruptcy petition against him" the words "if within four months next before the presentation of a bankruptcy petition by or against him, or in case of a receiving order made under section one hundred and three of the Bankruptcy Act, 1883, before the date of the order." Penal provisions of 82 & 33 Vict. c. 62.

27. (1.) There shall be repealed so much of section eighty-five of the Act of the session held in the twenty-fourth and twenty-fifth years of Her present Majesty, chapter ninety-six, intituled "An Act to consolidate and amend the statute law of England and Ireland relating to larceny and other similar offences," as provides that no person shall be liable to be convicted of any of the misdemeanours mentioned in sections seventy-five to eighty-four of that Act (being frauds by agents, bankers, or factors) if he shall have first disclosed the same in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy or insolvency. Amendment of 24 & 25 Vict. c. 96, s. 85.

(2.) A statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy shall not be admissible as evidence against that person in any proceeding in respect of any of the misdemeanours referred to in the said section eighty-five.

(a) These sections will be found in Vol. 15, App., pp. ix. and x.

(b) For sect. 11 of the Debtors Act, 1869, see Vol. 11, App., p. xxxviii.

**STATUTES AND PARTS OF STATUTES
AFFECTING THE CRIMINAL LAW,
PASSED IN THE SESSION OF PARLIAMENT OF 1891.**

REFORMATORY AND INDUSTRIAL SCHOOLS ACT, 1891.

54 & 55 VICT. CAP. 23.

An Act to assist the Managers of Reformatory and Industrial Schools in advantageously launching into useful Careers the Children under their Charge.—[3rd July, 1891.]

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Power to
apprentice or
dispose of
child.

1. If any youthful offender or child detained in or placed out on licence from a certified reformatory or industrial school conducts himself well, the managers of the school may, with his own consent, apprentice him, or dispose of him in, any trade, calling, or service, or by emigration, notwithstanding that his period of detention has not expired, and such apprenticing or disposition shall be as valid as if the managers were his parents.

Provided that where he is to be disposed of by emigration, and in any case unless he has been detained for twelve months, the consent of the Secretary of State shall also be required for the exercise of any power under this section.

Short title
and extent of
Act.

2. This Act may be cited as "The Reformatory and Industrial Schools Act, 1891," and it shall not apply to Ireland.

MAIL SHIPS ACT, 1891.

54 & 55 VICT. CAP. 31.

An Act to enable Her Majesty in Council to carry into effect Conventions which may be made with Foreign Countries respecting Ships engaged in Postal Service.—[21st July, 1891.]

Arrest and
execution of
process on
board ex-
empted mail
ships.

4. (1.) Where this section applies to a convention with a foreign State, and an exempted mail ship to which this section applies (a) is in a port in the United Kingdom, no person shall be arrested without warrant on board such ship, and before any process civil or criminal authorising the arrest of any person who is on board such ship is executed against that person the following provisions of this section shall be observed; that is to say,—

(a) Exempted mail ships to which the section applies are ships whether British or foreign the owners of which have given security to the satisfaction of the High Court for the purposes of the Mail Ships Act, 1891, in accordance with sect. 3 of the Act.

(a.) written notice of the intention to arrest a person who is, or is suspected to be, on board the ship, stating the hour at which, if necessary, the ship will be searched, shall, if it is a ship of a foreign State and there is at the port a consulate of that State, be left at the consulate, addressed to the consular officer : 51 & 55 Vic.
c. 81.
*Mail Ships
Act, 1891.*

(b.) it shall be the duty of the master upon demand, if the said person is on board his ship, to enable the proper officer to arrest him :

(c.) if the officer is unable to arrest the said person he may, but if it is a foreign ship only after the expiration of such time after notice was left at the consulate as is specified in the convention, search the ship for such person, and if he is found may arrest him.

(2.) The ship may be delayed for the purposes of this section for the time specified in the convention, but not for any longer time.

(3.) If the master of a ship refuses to permit a search of the ship in accordance with this section, any officer of customs may detain the ship, and such master shall be liable to a fine of five hundred pounds.

(4.) This section shall apply to the arrest of the master in like manner as in the case of any other person.

6. (1.) Where the convention with a foreign State provides that any provisions of the convention similar to those contained in this Act shall in any cases apply to a public ship of a foreign State when employed as a mail ship, it shall be lawful for Her Majesty the Queen to agree that the like provisions shall apply to a public ship of Her Majesty in the like cases when employed as a mail ship, and to give effect to such agreement. Application of
Act to public
ships.

(2.) An Order in Council applying this Act as regards a Convention with a foreign State may, if it seems to Her Majesty in Council to be consistent with the convention so to do, apply this Act as regards a public ship of that foreign State when employed as a mail ship in the cases authorised by the convention, and this Act shall apply accordingly, as if such ship were an exempted mail ship belonging to a private owner, and any person may be arrested on board such ship accordingly.

9. In this Act—

Definitions.

The expression "mail bag" means a mail of letters, or a box, or parcel, or any other envelope in which post letters within the meaning of the Acts relating to the Post Office, are conveyed ;

The expression "subsidy" includes a payment for the performance of a contract ;

The expression "master of a ship" includes any person in charge of a ship, whether commander, mate, or any other person ;

The expression "ship of a foreign State" means a ship entitled to sail under the flag of a foreign State ;

The expression "arresting authority" means any court, authority, or officer having power to arrest or detain a ship, or to arrest a person on board a ship, or to order such arrest or detention, or to order the execution of any process, civil or criminal, for the arrest of a person on board any ship ;

The expression "postal officer" means any person employed in the business of the Post Office of the United Kingdom or a British possession or foreign State, as the case may be, whether employed by the Postmaster-General, or the chief of the Post Office of the foreign State or by any person under him, or on behalf of any such Post Office.

10. This Act may be cited as "The Mail Ships Act, 1891."

Short title.

54 & 55 VICT.
c. 81.

*Mail Ships
Act, 1891,*

SCHEDULE.

BRITISH POSSESSIONS TO WHICH ACT IS APPLICABLE ONLY UPON THE GOVERNMENT
ADHERING TO CONVENTION.

British India.
Dominion of Canada.
Newfoundland.
New South Wales.
Victoria.
South Australia.

Western Australia.
Queensland.
Tasmania.
New Zealand.
Cape of Good Hope.
Natal.

STAMP DUTIES MANAGEMENT ACT, 1891.

54 & 55 VICT. CAP. 38.

*An Act to consolidate the Law relating to the Management of Stamp
Duties.*—[21st July, 1891.]

Penalty for
hawking
stamps.

6. (1.) If any person, whether licensed to deal in stamps or not, hawks or carries about for sale or exchange, any stamps, he shall in addition to any other fine or penalty to which he may be liable incur a fine of twenty pounds.

(2.) In default of payment of the fine, on summary conviction the offender shall be imprisoned for any term not exceeding two months.

(3.) All stamps which are found in the possession of the offender shall be forfeited, and shall be delivered to the Commissioners, to be disposed of as they think fit.

(4.) Any person may arrest a person found committing an offence against this section, and take him before a justice having jurisdiction where the offence is committed, who shall hear and determine the matter.

Offences relating to Stamps.

Certain
offences in
relation to
dies and
stamps pro-
vided by
Commis-
sioners to be
felonies.

18. Every person who does, or causes or procures to be done, or knowingly aids, abets, or assists in doing, any of the acts following; that is to say,

- (1.) Forges a die or stamp;
- (2.) Prints or makes an impression upon any material with a forged die;
- (3.) Fraudulently prints or makes an impression upon any material from a genuine die;
- (4.) Fraudulently cuts, tears, or in any way removes from any material any stamp, with intent that any use should be made of such stamp or of any part thereof;
- (5.) Fraudulently mutilates any stamp with intent that any use should be made of any part of such stamp;
- (6.) Fraudulently fixes or places upon any material or upon any stamp, any stamp or part of a stamp which, whether fraudulently or not, has been cut, torn, or in any way removed from any other material, or out of or from any other stamp;
- (7.) Fraudulently erases or otherwise either really or apparently removes from any stamped material any name, sum, date, or other matter or thing whatsoever thereon written, with the intent that any use should be made of the stamp upon such material;

- (8.) Knowingly sells or exposes for sale or utters or uses any forged stamp, or any stamp which has been fraudulently printed or impressed from a genuine die; 54 & 55 Vict. c. 88.

- (9.) Knowingly, and without lawful excuse (the proof whereof shall lie on the person accused) has in his possession any forged die or stamp or any stamp which has been fraudulently printed or impressed from a genuine die, or any stamp or part of a stamp which has been fraudulently cut, torn, or otherwise removed from any material, or any stamp which has been fraudulently mutilated, or any stamped material out of which any name, sum, date, or other matter or thing has been fraudulently erased or otherwise either really or apparently removed, *Stamp Duties Management Act, 1891,*

shall be guilty of felony, and shall on conviction be liable to be kept in penal servitude for any term not exceeding fourteen years, or to be imprisoned with or without hard labour for any term not exceeding two years.

14. Every person who without lawful authority or excuse (the proof whereof shall lie on the person accused) Making paper in imitation of paper used for stamp duties.

- (a.) makes or causes or procures to be made, or aids or assists in making, or knowingly has in his custody or possession, any paper in the substance of which shall appear any words, letters, figures, marks, lines, threads, or other devices peculiar to and appearing in the substance of any paper provided or used by or under the direction of the Commissioners for receiving the impression of any die, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate or pass for the same; or

- (b.) causes or assists in causing any such words, letters, figures, marks, lines, threads, or devices as aforesaid, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate or pass for the same, to appear in the substance of any paper whatever,

shall be guilty of felony, and shall on conviction be liable to be kept in penal servitude for any term not exceeding seven years or to be imprisoned with or without hard labour for any term not exceeding two years.

15. Every person who without lawful authority or excuse (the proof whereof shall lie on the person accused) purchases or receives or knowingly has in his custody or possession— Possession of paper, plates, or dies used for stamp duties.

- (a.) any paper manufactured and provided by or under the direction of the Commissioners, for the purpose of being used for receiving the impression of any die before such paper shall have been duly stamped and issued for public use; or

- (b.) any plate, die, dandy-roller, mould, or other implement peculiarly used in the manufacture of any such paper,

shall be guilty of a misdemeanour, and shall on conviction be liable to be imprisoned with or without hard labour for any term not exceeding two years.

16. On information given before a justice upon oath that there is just cause to suspect any person of being guilty of any of the offences aforesaid, such justice may, by a warrant under his hand, cause every house, room, shop, building, or place belonging to or occupied by the suspected person, or where he is suspected of being or having been in any way engaged or concerned in the commission of any such offence, or of Proceedings for detection of forged dies, &c.

54 & 55 Vict.
c. 38.

*Stamp Duties
Management
Act, 1891.*

Proceedings
for detection
of stamps
stolen or
obtained
fraudulently.

Licensed
person in
possession of
forged stamps
to be pre-
sumed guilty
until contrary
is shown.

secretory any machinery, implements, or utensils applicable to the commission of any such offence, to be searched, and if upon such search any of the said several matters and things are found, the same may be seized and carried away, and shall afterwards be delivered over to the Commissioners.

17. (1.) Any justice having jurisdiction in the place where any stamps are known or supposed to be concealed or deposited, may, upon reasonable suspicion that the same have been stolen or fraudulently obtained, issue his warrant for the seizure thereof, and for apprehending and bringing before himself or any other justice within the same jurisdiction the person in whose possession or custody the stamps may be found, to be dealt with according to law.

(2.) If the person does not satisfactorily account for the possession of the stamps, or it does not appear that the same were purchased by him at the chief office or at one of the head offices, or from some person duly appointed to sell and distribute stamps, or duly licensed to deal in stamps, the stamps shall be forfeited, and shall be delivered over to the Commissioners.

(3.) Provided that if at any time within six months after the delivery any person makes out to the satisfaction of the Commissioners that any stamps so forfeited were stolen or otherwise fraudulently obtained from him, and that the same were purchased by him at the chief office or one of the head offices, or from some person duly appointed to sell and distribute stamps, or duly licensed to deal in stamps, such stamps may be delivered up to him.

18. (1.) If any forged stamps are found in the possession of any person appointed to sell and distribute stamps, or being or having been licensed to deal in stamps, that person shall be deemed and taken, unless the contrary is satisfactorily proved, to have had the same in his possession knowing them to be forged, and with intent to sell, use, or utter them, and shall be liable to the punishment imposed by law upon a person selling, using, uttering, or having in possession forged stamps knowing the same to be forged.

(2.) If the Commissioners have cause to suspect any such person of having in his possession any forged stamps, they may by warrant under their hands authorise any person to enter between the hours of nine in the morning and seven in the evening into any house, room, shop, or building of or belonging to the suspected person, and if on demand of admittance, and notice of the warrant, the door of the house, room, shop, or building, or any inner door thereof, is not opened, the authorised person may break open the same and search for and seize any stamps that may be found therein or in the custody or possession of the suspected person.

(3.) All officers of the peace are hereby required, upon request by any person so authorised, to aid and assist in the execution of the warrant.

(4.) Any person who—

(a.) Refuses to permit any such search or seizure to be made as aforesaid; or

(b.) Assaults, opposes, molests, or obstructs any person so authorised in the due execution of the powers conferred by this section, or any person acting in his aid or assistance,

and any officer of the peace who upon any such request as aforesaid, refuses or neglects to aid and assist any person so authorised in the due execution of his powers, shall incur a fine of fifty pounds.

19. Where stamps are seized under a warrant, the person authorised by 54 & 55 Vict. c. 38. the warrant shall, if required, give to the person in whose custody or possession the stamps are found an acknowledgment of the number, particulars, and amount of the stamps, and permit the stamps to be marked before the removal thereof.

20. Every person who by any writing in any manner defaces any adhesive stamp before it is used shall incur a fine of five pounds: Provided that any person may with the express sanction of the Commissioners, and in conformity with the conditions which they may prescribe, write upon or otherwise appropriate an adhesive stamp before it is used for the purpose of identification thereof.

21. Any person who practises or is concerned in any fraudulent act, contrivance, or device, not specially provided for by law, with intent to defraud Her Majesty of any duty, shall incur a fine of fifty pounds.

27. In this Act, unless the context otherwise requires,—

The expression "Commissioners" means Commissioners of Inland Revenue :

The expression "officer" means officer of Inland Revenue :

The expression "chief office" means chief office of Inland Revenue :

The expression "head offices" means the head offices of Inland Revenue in Edinburgh and Dublin :

The expression "duty" means any stamp duty for the time being chargeable by law :

The expression "material" includes every sort of material upon which words or figures can be expressed :

The expression "instrument" includes every written document :

The expression "die" includes any plate, type, tool, or implement whatever used under the direction of the Commissioners for expressing or denoting any duty, or rate of duty, or the fact that any duty or rate of duty or penalty has been paid, or that an instrument is duly stamped, or is not chargeable with any duty or for denoting any fee, and also any part of any such plate, type, tool, or implement :

The expressions "forge" and "forged" include counterfeit and counterfeited :

The expression "stamp" means as well a stamp impressed by means of a die as an adhesive stamp for denoting any duty or fee :

The expression "stamped" is applicable as well to instruments and material impressed with stamps by means of a die as to instruments and material having adhesive stamps affixed thereto :

The expressions "executed" and "execution," with reference to instruments not under seal, mean signed and signature :

The expression "justice" means justice of the peace.

29. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-two.

30. This Act may be cited as "The Stamp Duties Management Act, 1891."

Stamp Duties Management Act, 1891.

Mode of proceeding when stamps are seized.
As to defacement of adhesive stamps.
Penalty for frauds in relation to duties.
Definitions.

Commencement.
Short title.

PENAL SERVITUDE ACT, 1891.

54 & 55 VICT. CAP. 69.

An Act to amend the Law relating to Penal Servitude and the Prevention of Crime.—[5th August, 1891.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Amendment
of law as to
term of penal
servitude and
as to sentences
of imprison-
ment—
27 & 28 Vict.
c. 47.

1. (1.) Where under any enactment in force when this section comes into operation a court has power to award a sentence of penal servitude, the sentence may, at the discretion of the court, be for any period not less than three years, and not exceeding either five years, or any greater period authorised by the enactment.

(2.) Where under any Act now in force or under any future Act a court is empowered or required to award a sentence of penal servitude, the court may in its discretion, unless such future Act otherwise provides, award imprisonment for any term not exceeding two years, with or without hard labour.

(3.) Section two of the Penal Servitude Act, 1864, is hereby repealed with respect to any sentence awarded after the date at which this section comes into operation.

Amendment
of law as to
apprehension
of licensees
and super-
vises—
34 & 35 Vict.
c. 112—
27 & 28 Vict.
c. 47.

2. (1.) Any constable may take into custody without warrant any holder of a licence under the Penal Servitude Acts, or any person under the supervision of the police in pursuance of the Prevention of Crimes Act, 1871, whom he reasonably suspects of having committed any offence, and may take him before a court of summary jurisdiction to be dealt with according to law.

(2.) Any convict may be convicted before a court of summary jurisdiction of an offence against section three of the Prevention of Crimes Act, 1871, although he was brought before the court on some other charge or not in manner provided by that section.

(3.) Section six of the Penal Servitude Act, 1864, is hereby repealed.

Power to
grant licences
in cases of
unexpired
terms—
27 & 28 Vict.
c. 47.

3. (1.) Where an offender is, under section nine of the Penal Servitude Act, 1864, undergoing, or liable to undergo, a term of penal servitude in consequence of the forfeiture or revocation of a licence granted in pursuance of the Penal Servitude Acts, Her Majesty may grant a licence to the offender in like manner as if the forfeiture or revocation of the former licence were a sentence of penal servitude which the offender is likely to undergo.

(2.) Where a person is sentenced on any conviction to a term of penal servitude, and by virtue of the same conviction his licence is forfeited, the term for which he is sentenced, together with the term which he is required further to undergo under the said section shall, for all purposes of the Penal Servitude Acts relating to licences, be deemed to be one term of penal servitude, and those Acts shall apply as if, on conviction of the offence, the offender had been sentenced to the combined term.

(3.) In section nine of the Penal Servitude Act, 1864, the words "on indictment of any offence" shall be substituted for the words "of any indictable offence," and in Schedule A to the said Act the words "on indictment of some offence" shall be substituted for the words "of some indictable offence."

4. (1.) Sections five and eight of the Prevention of Crimes Act, 1871, 54 & 55 Vict. and section two of the Prevention of Crimes Act, 1879 (which recites c. 69. and refers to those sections), shall have effect as if the following substitutions had been made in the said sections five and eight; that is *Penal Servitude Act, 1891.* to say,

(a.) As if for the words "and whenever he changes his residence from one police district to another shall notify such change of residence to the chief officer of police of the police district which he is leaving, and to the chief officer of police of the police district into which he goes to reside" occurring in each section there had been substituted in each section the following words: Amendment of law as to notices of residence to be given by licensees and supervisees—

"and whenever he is about to leave a police district he shall notify such his intention to the chief officer of police of that district, stating the place to which he is going, and also, if required, and, so far as is practicable, his address at that place, and whenever he arrives in any police district he shall forthwith notify his place of residence to the chief officer of police of such last-mentioned district;" and 42 & 43 Vict. c. 55.

(b.) As if for the words in section five, from "If any holder" to the end of the section, and for the words in section eight, from "If any person" to the end of the section, there had been substituted in each section the following words:—

"If any person to whom this section applies fails to comply with any of the requisitions of this section, he shall, in any such case, be guilty of an offence against this Act, unless he proves to the satisfaction of the court before whom he is tried, either that being on a journey he tarried no longer in the place, in respect of which he is charged with failing to notify his place of residence, than was reasonably necessary, or that otherwise he did his best to act in conformity with the law; and on conviction of such offence it shall be lawful for the court in its discretion either to forfeit his licence, or to sentence him to imprisonment with or without hard labour for a term not exceeding one year."

(2.) Her Majesty may, by order under the hand of a Secretary of State, remit any of the requirements of sections five and eight of the Prevention of Crimes Act, 1871, either generally or in the case of any holder of a licence or person subject to the supervision of the police.

5. The provisions of the Penal Servitude Act, 1864, applying to a licence in the form set forth in Schedule A. to that Act, shall apply also to a licence in any other form for the time being authorised by section ten of that Act. Amendment of 27 & 28 Vict. c. 47, ss. 4, 8.

6. A person who has been convicted on indictment of a crime within the meaning of the Prevention of Crimes Act, 1871, and against whom a previous conviction of such crime is proved shall, Extension of 34 & 35 Vict. c. 112, s. 7.

(a.) if the second sentence is to a term of imprisonment, then at any time within seven years after the expiration of the sentence; and

(b.) if the second sentence is to a term of penal servitude, then whilst at large on licence under that sentence, and also at any time within seven years after the expiration of the sentence, be guilty of an offence against the Prevention of Crimes Act, 1871, under the circumstances stated in section seven of that Act or any of them, and may be taken into custody in manner provided by that section.

54 & 55 Vict.
c. 69.

Penal Servitude Act, 1891.

Amendment
of 5 Geo. 4,
c. 88, and
34 & 35 Vict.
c. 112, s. 15,
as to rogues
and vaga-
bonds.
Regulations
as to mea-
suring and
photographing
of prisoners.
Application to
Scotland and
Ireland.

Application of
penal servi-
tude pro-
visions to
Channel
Islands and
Isle of Man.
Short title—
16 & 17 Vict.
c. 99—20 & 21
Vict. c. 3—
27 & 28 Vict.
c. 47.

7. Section four of the Act, passed in the fifth year of the reign of King George the Fourth, chapter eighty-three, intituled "An Act for the punishment of idle and disorderly persons and rogues and vagabonds in that part of Great Britain called England," as amended by section fifteen of the Prevention of Crimes Act, 1871, shall be read and construed as if the provisions applying to suspected persons and reputed thieves frequenting the places and with the intent therein described, applied also to every suspected person or reputed thief loitering about or in any of the said places and with the said intent.

8. The Secretary of State may make regulations as to the measuring and photographing of all prisoners who may for the time being be confined in any prison; and all the provisions of section six of the Prevention of Crimes Act, 1871, with respect to the photographing of prisoners shall apply to any regulations as to measuring made in pursuance of this section. All regulations made under this section shall be laid before both Houses of Parliament as soon as practicable after they are made.

9. The powers of the Secretary of State under this Act shall be exercised as to Scotland by the Secretary for Scotland, and as to Ireland by the Lord Lieutenant.

10. Any person convicted in the Channel Islands or the Isle of Man of an offence for which he is sentenced to penal servitude may be confined, removed, and otherwise dealt with in the same place and manner as if he had been convicted in the United Kingdom.

11. This Act may be cited as "The Penal Servitude Act, 1891," and this Act and the Penal Servitude Acts, 1853, 1857, and 1864, may be cited collectively as "The Penal Servitude Acts, 1853 to 1891," and are in this Act referred to as "The Penal Servitude Acts."

MARKETS AND FAIRS (WEIGHING OF CATTLE) ACT, 1891.

54 & 55 VICT. CAP. 70.

An Act to amend the Markets and Fairs (Weighing of Cattle) Act, 1887.
—[5th August, 1891.]

Statistics as
to weight and
sale of cattle.

3. (1.) The market authority of every market and fair held in any of the places mentioned in the schedule to this Act shall send to the Board of Agriculture returns, at such intervals, and in such form and with such particulars as the Board of Agriculture by order prescribe, showing, so far as the market authority can ascertain the same, the number of cattle entering and the number and weight of cattle weighed at the market or fair, and the price of the cattle sold thereat. Such market authority may, for the purpose of making a prescribed return, cause any cattle which have been sold at the market to be weighed without fee.

(2.) The Board of Agriculture shall publish the returns so sent, or abstracts thereof, or extracts therefrom, in such manner as they think most expedient for the information of the public.

(3.) If a market authority wilfully makes default in complying with the requirements of this section, it shall for each offence be liable on summary conviction to a fine not exceeding twenty pounds, or in case of a continuing offence to a fine not exceeding ten pounds for every day during which the offence continues.

(4.) If any person makes any false or fraudulent statement in any return made in pursuance of this section he shall be guilty of a misdemeanor. 54 & 55 Vict. c. 70.

(5.) The Board of Agriculture may from time to time vary or add to the list of places in the schedule to this Act. *Markets and Fairs (Weighing of Cattle) Act, 1891.*

4. (1.) An auctioneer shall not, unless exempted by order of the Board of Agriculture from the requirement of this section, sell cattle at any mart where cattle are habitually or periodically sold, unless there are provided at that mart similar facilities for weighing cattle as are required by the principal Act and this Act in the case of cattle sold at a market or fair to which the principal Act applies. Application of Act to auction marts.

(2.) Every auctioneer who in any place from which returns are required to be made under this Act sells cattle at any such mart as aforesaid shall, unless exempted as aforesaid, make the like returns to the Board of Agriculture with respect to cattle entering, weighed, and sold at that mart as are required by this Act to be made by a market authority, and shall be subject to the like penalty for making any false or fraudulent statement in such return.

(3.) If any such auctioneer makes default in complying with the requirements of this section, the auctioneer, or, if he is in the employment of any person, the person by whom he is employed, shall for each offence be liable on summary conviction to a fine not exceeding twenty pounds, or in case of a continuing offence to a fine not exceeding ten pounds for every day during which the offence continues.

(4.) This section shall not come into operation until the first day of January one thousand eight hundred and ninety-two.

5. This Act shall, in its application to Ireland, be construed as if for the expression "the Board of Agriculture" were substituted the expression "the Irish Land Commission." Application to Ireland.

6. This Act shall be construed as one with the principal Act, and may be cited as the Markets and Fairs (Weighing of Cattle) Act, 1891, and the principal Act and this Act may be cited together as the Markets and Fairs (Weighing of Cattle) Acts, 1887 and 1891. Construction and short title.

SCHEDULE.

ENGLAND.

Ashford.	London (Metropolitan Cattle Market)
Birmingham.	Newcastle-on-Tyne.
Bristol.	Norwich.
Leicester.	Salford.
Leeds.	Shrewsbury.
Lincoln.	Wakefield.
Liverpool (Stanley Market).	York.

SCOTLAND.

Aberdeen.	Glasgow.
Dundee.	Perth.
Edinburgh.	

IRELAND.

Belfast.	Dublin.
Cork.	

**STATUTES AND PARTS OF STATUTES
AFFECTING THE CRIMINAL LAW,
PASSED IN THE SESSION OF PARLIAMENT OF 1892.**

POLICE RETURNS ACT, 1892.

55 & 56 VICT. CAP. 38.

An Act to alter the period for which certain Police Returns are required to be made.—[27th June, 1892.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows :

Amendment
of provision
as to annual
police returns
—19 & 20
Vict. c. 69.
Commence-
ment.
Short title.

1. The annual statement required by section fourteen of the County and Borough Police Act, 1856, shall be made for each calendar year, and shall be transmitted to one of Her Majesty's principal Secretaries of State as soon as may be after the termination of that year.

2. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-three.

3. This Act may be cited as "The Police Returns Act, 1892."

WITNESSES (PUBLIC INQUIRIES) PROTECTION ACT, 1892.

55 & 56 VICT. CAP. 64.

An Act for the better Protection of Witnesses giving Evidence before any Royal Commission or any Committee of either House of Parliament, or on other Public Inquiries.—[28th June, 1892.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Definition.

1. In this Act the word "inquiry" shall mean any inquiry held under the authority of any Royal Commission or by any committee of either House of Parliament, or pursuant to any statutory authority, whether the evidence at such inquiry is or is not given on oath, but shall not include any inquiry by any court of justice.

Persons
obstructing or
intimidating
witnesses
guilty of mis-
demeanour.

2. Every person who commits any of the following acts, that is to say, who threatens, or in any way punishes, damnifies, or injures, or attempts to punish, damnify, or injure, any person for having given evidence upon any inquiry, or on account of the evidence which he has given upon any such inquiry, shall, unless such evidence was given in bad faith, be guilty of a misdemeanour, and be liable upon conviction thereof to a maximum

penalty of one hundred pounds, or to a maximum imprisonment of three months. 55 & 56 Vict. c. 64.

3. A prosecution for any offence under this Act may be heard and determined by a court of summary jurisdiction under the Summary Jurisdiction Acts, provided that should either the complainant or the party charged object to the case being dealt with summarily, the court shall send such case for trial to the quarter sessions or assize, or in cases arising within the metropolitan area to the Central Criminal Court.

*Witnesses
(Public
Inquiries)
Protection
Act, 1892.*

4. It shall be lawful for any court before which any person may be convicted of any offence under this Act, if it thinks fit, in addition to sentence or punishment by way of fine or imprisonment, to condemn such person to pay the whole or any part of the costs and expenses incurred in and about the prosecution and conviction for the offence of which he shall be convicted, and, upon the application of the complainant, and immediately after such conviction, to award to complainant any sum of money which it may think reasonable, having regard to all the circumstances of the case, by way of satisfaction or compensation for any loss of situation, wages, status, or other damnification or injury suffered by the complainant through or by means of the offence of which such person shall be so convicted, provided that where the case is tried before a jury, such jury shall determine what amount, if any, is to be paid by way of satisfaction or compensation.

*Prosecution of
offences.
Court to have
power to
award costs
and compen-
sation to party
aggrieved.*

5. The amount awarded for such satisfaction or compensation, together with such costs, to be taxed by the proper officer of the court, shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and be recoverable accordingly.

*Costs and
compensation
to be a judg-
ment debt.*

6. In the application of this Act to Scotland the following modifications shall have effect:—

*Application to
Scotland.*

(1.) A court of summary jurisdiction means the sheriff.

(2.) If the complainant or the party charged, as in section three of this Act mentioned, objects to the case being dealt with summarily, it shall be sent for trial by the sheriff with a jury, or by the High Court of Justiciary, as Her Majesty's Advocate shall direct.

(3.) Judgment debt means a civil debt, and such debt may be recovered in any competent court.

7. Nothing in this Act contained shall in any way lessen or affect any power or privilege possessed by either House of Parliament, or any power given by statute in the premises.

8. This Act may be cited as "The Witnesses (Public Inquiries) Protection Act, 1892."

Short title.

STATUTES AND PARTS OF STATUTES
AFFECTING THE CRIMINAL LAW,
PASSED IN THE SESSION OF PARLIAMENT OF 1893.

POLICE ACT, 1893.

56 VICT. CAP. 10.

An Act to amend the Police Acts.—[9th June, 1893.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Constables employed on fire duty to be deemed to be engaged on police duty. Borough police may be employed as fire brigade—10 & 11 Vict. c. 89.

1. Where a constable belonging to any police force, in pursuance of any general or special direction of the police authority, acts as a fireman, or assists in the extinguishment of fire, or in protecting life or property from fire, such constable shall be deemed for the purposes of the Police Act, 1890, to be in the execution of his duty.

2. (1.) The council of a borough may by resolution delegate to the watch committee its powers under sections thirty-two and thirty-three of the Town Police Clauses Act, 1847, or under any similar enactments in any local Act : and where such resolution has been passed, the watch committee may employ constables wholly or partially as firemen :

Provided that no constable, who at the passing of this Act is not employed to act as fireman shall be employed without his consent.

(2.) The pay of constables exclusively so employed, and the allowances of constables partially so employed, shall be defrayed from the fund or rate which is applicable to the purposes of the fire brigade or fire police.

(3.) The pensions and gratuities granted to such constables, and the allowances and gratuities granted to their widows and children shall be paid out of the police pension fund ; but the council shall pay from the fund or rate applicable to the purposes of the fire brigade or fire police to the police pension fund such contribution as the Secretary of State may, by general or special order, determine to be a fair contribution in respect of such pensions, gratuities, and allowances.

Power to increase pension.

3. (1.) Where a pension is in pursuance of the Police Act, 1890, granted to the constable on the scale applicable to partial disability for earning a livelihood, the police authority may, within three years from the grant of the pension, if satisfied by the evidence of some legally qualified medical practitioner or practitioners selected by the police authority that the disability attributable to the injury received in the execution of duty has become total, increase the pension to the amount allowed by the provisions of the scale applicable to total disability.

(2.) This section shall apply in the case of all pensions granted since the commencement of the Police Act, 1890.

4. The provisions of sub-section two of section thirteen of the Police Act, 1890, shall apply to any constable in receipt of a pension who is appointed to any office remunerated out of any parochial, district, or other rate. 56 Vict. c. 10.
Police Act,
1893.

5. A police authority, in addition to the powers of investments conferred by section eighteen of the Police Act, 1890, may invest the capital of the pension fund in debentures or mortgages issued or made by a county council in pursuance of the powers conferred by section sixty-nine sub-section eight of the Local Government Act, 1888. Amendment
of 53 & 54
Vict. c. 45,
s. 18 (2).
Extension of
powers of
investment of
pension fund.
Amendment
of Sch. I.—
53 & 54 Vict.
c. 45.

6. In schedule I, (11) (c) of the Police Act, 1890, for the words ("where a constable has, in the course of the three years next before the date of his retirement or death been in more than one rank") shall be substituted the words ("where a constable at the date of his retirement or death holds a rank to which he has been promoted within the three years previous.") Construction
of Act and
saving.

7. This Act shall be read as one with the Police Act, 1890, and nothing in this Act shall interfere with or diminish the powers of the Secretary of State, under section seventeen of that Act. Partial repeal
of 10 & 11
Vict. c. 89,
and amend-
ment of local
Acts.

8. (1.) The words "any mischief by fire and" in section fourteen of the Town Police Clauses Act, 1847, are hereby repealed, and this Act shall have effect, notwithstanding anything in any other Act, local or general, to the contrary.

(2.) Where any local Act or order contains provisions as to a fire brigade or fire police, the Secretary of State may frame and submit to Parliament a provisional order repealing or modifying such provisions so as to bring them into harmony with the provisions of this Act, and he may by such order unite any existing fire brigade pension fund with the police pension fund, and make any other adjustments which may appear to him necessary in order to give effect to this Act.

9. This Act may be cited as "The Police Act, 1893;" and the Police Acts, 1839 to 1890, and this Act may be cited together as "The Police Acts, 1839 to 1893." Short title.

NORTH SEA FISHERIES ACT, 1893.

56 & 57 VICT. CAP. 17.

An Act to carry into effect an International Convention respecting the Liquor Traffic in the North Sea.—[29th June, 1893.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The Convention set out in the schedule to this Act (hereinafter referred to as the scheduled Convention) is, with the Protocol thereto annexed, hereby confirmed, and the articles thereof shall be of the same force as if they were enacted in the body of this Act. Confirmation
of Convention.

2. If within the North Sea limits but outside territorial waters any person on board or belonging to a British vessel supplies spirituous liquors to any person on board or belonging to a sea fishing boat he shall be liable— Penalty for
supplying,
exchanging,
or otherwise
selling spirits.

56 & 57 Vict.
c. 17.

*North Sea
Fisheries Act,
1893.*
—

Penalty for
purchasing
spirits by
exchange or
otherwise.

Penalty for
breach of
licence.

Power to
make regula-
tions as to
licences and
other matters.

Enforcement
of Act—
46 & 47 Vict.
c. 22.

Legal pro-
ceedings.

Evidence.

(a) if the liquors are supplied in exchange for any article not belonging to the person supplied, to a fine not exceeding fifty pounds, or, in the discretion of the court, to imprisonment for a term not exceeding three months, with or without hard labour; and

(b) if the liquors are sold otherwise than by way of exchange for any such article, to a fine not exceeding thirty pounds, or, in the discretion of the court, to imprisonment for a term not exceeding three months, with or without hard labour.

3. If within the North Sea limits but outside territorial waters any person on board or belonging to a British sea fishing boat purchases spirituous liquors, he shall be liable—

(a) if he gives any article not belonging to him in exchange for the liquors, to a fine not exceeding fifty pounds, or, in the discretion of the court, to imprisonment for a term not exceeding three months, with or without hard labour; and

(b) if he purchases the liquors otherwise than by way of exchange for any such article, to a fine not exceeding ten pounds.

4. If within the North Sea limits but outside territorial waters any person on board or belonging to a British vessel deals with any person on board or belonging to a sea fishing boat in any provisions or other articles for his use, except spirituous liquors, without a licence granted in pursuance of Article Three of the scheduled Convention, or without carrying on his vessel the mark agreed upon in pursuance of that article, or in contravention of any conditions of a licence so granted, he shall be liable to a fine not exceeding twenty pounds, and his licence may be revoked.

5. Her Majesty the Queen may from time to time by Order in Council make regulations for any of the following purposes:

(a) for prescribing the mode in which licences under Article Three of the scheduled Convention are to be granted, renewed, and revoked; and

(b) for prescribing the mode of application for such licences, and the conditions under which, and the time for which, the licences are to be granted; and

(c) generally for giving effect to any of the provisions of this Act or any of the articles of the scheduled Convention.

6. For the purpose of enforcing the provisions of this Act in the case of British and foreign vessels, whether within or beyond the North Sea limits, all British and foreign sea fishery officers respectively within the meaning of the Sea Fisheries Act, 1883, shall have the same powers, and be entitled to the same protection, as they have and are entitled to for the purpose of enforcing the provisions of that Act in the case of the British and foreign sea fishing boats respectively.

Provided that in the case of a vessel not being either a sea fishing boat or a vessel habitually employed in dealing with fishermen the power of a sea fishery officer to take the vessel to any port shall not be exercised, unless the sea fishery officer is satisfied that its exercise is necessary for the suppression of grave disorder.

7. Sections sixteen, eighteen, nineteen, twenty, twenty-one, and twenty-two of the Sea Fisheries Act, 1883, shall apply in the case of offences, fines, and legal proceedings under this Act in the same manner as they apply in the case of offences, fines, and legal proceedings under that Act, and in those sections as so applied the expression "sea fishing boat" shall include any vessel.

8. Section seventeen of the Sea Fisheries Act, 1883, shall apply in the

case of any formal statement drawn up in pursuance of Article Seven of the scheduled Convention in the same manner as it applies in the case of any document drawn up in pursuance of the Convention set out in the First Schedule to that Act.

9. In this Act—

The expression “North Sea limits” shall mean the limits of the North Sea as fixed by Article Four of the Convention set out in the First Schedule of the Fisheries Act, 1883.

The expression “territorial waters” shall mean the territorial waters of Her Majesty’s dominions as defined by the Territorial Waters Jurisdiction Act, 1878.

The expression “sea fishing boat” shall have the same meaning as in the Sea Fisheries Act, 1883.

The expression “vessel” shall include ship, boat, lighter, and craft of every kind, whether navigated by steam or otherwise.

The expression “spiruous liquors” shall include every liquid obtained by distillation and containing more than five per centum of alcohol.

10. (1.) This Act shall come into force on such day as may be fixed by a notice in that behalf published in the *London Gazette*.

(2.) The provisions of this Act relating to the sea fishery officers of any foreign State bound by the Convention set out in the First Schedule to the Sea Fisheries Act, 1883, shall continue in operation notwithstanding the termination of the operation of that Convention as respects that foreign State.

(3.) So much of this Act as has effect outside territorial waters, shall, if the scheduled Convention ceases to be binding on Her Majesty, cease to apply to the vessels and officers of any foreign State bound by the scheduled Convention, but, subject as aforesaid, this Act shall continue in force notwithstanding the determination of the scheduled Convention.

(4.) A notification in the *London Gazette* shall be sufficient evidence of the adhesion of any foreign State to the scheduled Convention, and of the application of this Act to the vessels and officers of any foreign States.

11. The North Sea Fisheries Act, 1888, is hereby repealed.

12. This Act may be cited as “The North Sea Fisheries Act, 1893.”

North Sea Fisheries Act, 1893.

Definitions—
41 & 42 Vict.
c. 73.

Commence-
ment and
continuance of
Act.

Repeal of
51 & 52 Vict.
c. 18.
Short title.

SCHEDULE.

CONVENTION RESPECTING THE LIQUOR TRAFFIC IN THE NORTH SEA.

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, His Majesty the German Emperor, King of Prussia, in the name of the German Empire, His Majesty the King of the Belgians, His Majesty the King of Denmark, the President of the French Republic, and His Majesty the King of the Netherlands, having recognised the necessity of remedying the abuses arising from the traffic in spirituous liquors amongst the fishermen in the North Sea outside territorial waters, have resolved to conclude a Convention for this purpose, and have named as their Plenipotentiaries, that is to say:

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, the Honourable Sir William Stuart, Knight Commander of Her Most distinguished Order of St. Michael and St. George, and Companion of Her Most Honourable Order of the Bath, her Envoy Extraordinary and Minister Plenipotentiary at the Hague;

His Majesty the German Emperor, King of Prussia, Baron Jean Antoine de Saurma-Feltsch, Chevalier of the second class of his Orders of the Red Eagle and of the Crown, &c., Privy Councillor of Legation, and Envoy Extraordinary and Minister Plenipotentiary at the Hague;

His Majesty the King of the Belgians, Baron Auguste d'Anethan, Grand Officer of his Order of Leopold, Chevalier of the Order of the Netherlands Lion, Grand Cross of the Order of the Oaken Crown of Luxembourg, &c., his Envoy Extraordinary and

56 & 57 VIOT.
c. 17.

*North Sea
Fisheries Act,
1898.*

Minister Plenipotentiary at the Hague, and M. Leopold Orban, Commander of his Order of Leopold, Commander of the Order of the Netherlands Lion, &c., his Envoy Extraordinary and Minister Plenipotentiary, Director-General of Political Affairs at the Ministry for Foreign Affairs at Brussels;

His Majesty the King of Denmark, M. Corneille Marius Virnly, Chevalier of his Order of Dannebrog, Consul for Denmark;

The President of the French Republic, M. Louis Désiré Legrand, Officer of the National Order of the Legion of Honour, Grand Cross of the Order of the Netherlands Lion, &c., Envoy Extraordinary and Minister Plenipotentiary of the French Republic at the Hague;

His Majesty the King of the Netherlands, the Jonkheer Abraham Pierre Corneille van Karnebeek, Chevalier of his Order of the Netherlands Lion, &c., his Minister for Foreign Affairs, and M. Edouard Nicolas Rahusen, Chevalier of his Order of the Netherlands Lion, &c., President of the College of Marine Fisheries:

Who, after having communicated their full powers, found in good and due form, have agreed upon the following articles:—

ARTICLE I.

The provisions of the present Convention shall apply to the North Sea, outside territorial waters, and within the limits fixed by Article IV. of the Convention of the Hague of the 6th May, 1882, respecting the police of the fisheries to every person on board a ship or boat of any one of the High Contracting Parties.

ARTICLE II.

The sale of spirituous liquors to persons on board or belonging to fishing boats is forbidden.

The purchase of those liquors by such persons is forbidden.

The exchange of spirituous liquors for any article, and especially for products of the fisheries, gear or equipments of fishing boats, or fishing implements, is forbidden.

Every liquid obtained by distillation, and containing more than five litres of alcohol per hectolitre, shall be considered a spirituous liquor.

ARTICLE III.

The liberty to deal with fishermen in provisions and other articles for their use (spirituous liquors excepted) shall be subject to a licence to be granted by the Government of the country to which the vessel belongs. This licence must specify the following amongst other conditions:—

1. The vessel may not have on board a quantity of spirits greater than what is deemed requisite for the consumption of her crew.

2. All exchange of the articles above indicated for products of the fisheries, gear, or equipments of fishing boats, or fishing implements, is forbidden.

Vessels provided with this licence must carry a special and uniform mark to be agreed upon by the High Contracting Powers.

ARTICLE IV.

The High Contracting Parties engage to take, or to propose to their respective Legislatures, the necessary measures for ensuring the execution of the present Convention, and especially for punishing, by either fine or imprisonment, or by both those who may contravene Articles II. and III.

ARTICLE V.

The tribunals competent to take cognizance of infractions of Articles II. and III. are those of the country to which the accused vessel belongs. If vessels of different nationalities should be implicated in the same infraction, the Powers to which such vessels belong will mutually communicate to each other the judgments given by the tribunals.

ARTICLE VI.

Prosecutions for infractions shall be instituted by the State, or in its name.

Infractions may be verified by all means of proof allowed by the legislation of the country of the court concerned.

ARTICLE VII.

The superintendence shall be exercised by the cruisers of the High Contracting Parties which are charged with the police of the fisheries.

When the officers commanding these cruisers have reason to believe that an infraction of the measures provided for in the present Convention has been committed, they may require the captain or master to exhibit the official documents

establishing the nationality of his vessel, and where the case occurs, the licence. The fact of such documents having been exhibited shall then be indorsed upon them immediately. 56 & 57 Vm. c. 17.

Further, formal statements of the facts may be drawn up by the said officers whatever may be the nationality of the accused vessel. These formal statements shall be drawn up according to the forms and in the language used in the country to which the officer belongs; they may be used as means of proof in the country where they are adduced, and conformably with the laws of that country. The accused and the witnesses shall be entitled to add or to have added thereto, in their own language, any explanations which they may think useful. These declarations must be duly signed.

*North Sea
Fisheries Act,
1898.*

Resistance to the directions of commanders of cruisers, or of those who act under their orders, shall, without taking into account the nationality of the cruisers, be considered as resistance to national authority.

The commander of the cruiser may, if the case appears to him sufficiently serious to justify the step, take the offending vessel into a port of the nation to which she belongs.

ARTICLE VIII.

The proceedings in respect of infractions of the provisions of the present Convention shall always take place as summarily as the laws and regulations will permit.

ARTICLE IX.

The High Contracting Parties will communicate to each other, at the time of the exchange of ratifications, the laws which shall have been made in their respective countries in relation to the object of the present Convention.

ARTICLE X.

States which have not signed the present Convention may adhere to it on making a request to that effect. This adhesion shall be notified through the diplomatic channel to the Government of the Netherlands, and by the latter to the other Signatory Powers.

ARTICLE XI.

The present Convention shall be brought into operation from and after a day to be agreed upon by the High Contracting Parties.

It shall remain in force for five years from that day, and, unless any of the High Contracting Parties shall, twelve months before the expiration of the said period of five years have given notice of its intention to terminate its operation, it shall remain in force for one year longer, and so on from year to year.

If the Convention of the Hague of the 6th May, 1882, respecting the police of the fisheries, should cease to be in force, Article XXVI of the same Convention shall continue to operate as regards the object of the present arrangement.

ARTICLE XII.

The present Convention shall be ratified; the ratifications shall be exchanged at the Hague as soon as possible, and, if practicable, within a year.

In witness whereof, the respective Plenipotentiaries have signed the present Convention, and have thereto affixed their seals.

Done at the Hague, in six copies, the 16th November, 1887.

(L.S.)	W. STUART.
(L.S.)	Baron SAURMA.
(L.S.)	Baron A. D'ANETHAN.
(L.S.)	LEOPOLD ORBAN.
(L.S.)	C. M. VIRULY.
(L.S.)	LOUIS LEGRAND.
(L.S.)	V. KAERNBEKE.
(L.S.)	E. N. RAHREN.

PROTOCOL.

Whereas it appears from the communications which have been received by the Government of the Netherlands that the Government of the French Republic is not at present in a position to proceed to the ratification of the Convention which was signed at the Hague on the 16th November, 1887, for remedying the abuses arising from the traffic of spirituous liquors amongst the fishermen in the North Sea outside territorial waters, the undersigned Plenipotentiaries of Great Britain, of Germany, of Belgium, of Denmark, and Minister for Foreign Affairs of the Kingdom of the

56 & 57 Vict. c. 17. Netherlands, having met in conference at the Ministry of Foreign Affairs at the Hague this 14th day of February, 1893, and being duly authorised to that effect, have agreed as follows :—

North Sea
Fisheries Act,
1893.

1. The above-mentioned Convention shall be brought into force by the other signatory Governments, namely, Great Britain, Germany, Belgium, Denmark, and the Netherlands, six weeks after they shall have exchanged the ratifications thereof.

2. The power of adhesion accorded by Article X. of the said Convention for non-signatory States is extended to France.

3. In modification of Article XI. of the Convention the periods of five years and twelve months are respectively reduced to one year and to three months.

4. The present protocol, which shall be ratified at the same time as the Convention to which it refers, has been drawn up in five copies.

(Signed)	HORACE RUMBOLD.
"	K. DE RANDEAU.
"	BARON D'ANETHAN.
"	C. M. VIRULY.
"	W. TIENHOVEN.

PRISON (OFFICERS' SUPERANNUATION) ACT, 1893.

56 & 57 VICT. CAP. 26.

An Act to explain and amend certain Provisions of the Prison Act, 1877, with respect to the Superannuation of Prison Officers.—[27th July, 1893.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Explanation
of "existing
officer," and
"prison
service" in
40 & 41 Vict.
c. 21.

1. For the purposes of superannuation allowance the expression "existing officer of a prison" in the Prison Act, 1877, shall include and be deemed to have included any person who immediately before the commencement of that Act was an officer attached to a prison, and was appointed to hold, in immediate succession to his office, any of the offices mentioned in sections six and seven of that Act, and a superannuation allowance may be granted to any existing officer of a prison on the like conditions as if he had remained an officer in a local prison; and the expression "prison service" shall include and be deemed to have included, as respects the period after the commencement of that Act, service in any one or more of the offices mentioned in sections six and seven of that Act: Provided that nothing in this Act shall exempt any such person from the operation of any Order in Council as to compulsory retirement of permanent civil servants.

Short title.

2. This Act may be cited as "The Prison (Officers' Superannuation) Act, 1893," and shall be read with the Prison Acts, 1865 to 1886.

REFORMATORY SCHOOLS ACT, 1893.

56 & 57 VICT. CAP. 48.

An Act to amend the Law relating to Reformatory Schools.—[22nd September, 1893.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows :

1. Where a youthful offender, who in the opinion of the court before whom he is charged is less than sixteen years of age, is convicted, whether on indictment or by a court of summary jurisdiction, of an offence punishable with penal servitude or imprisonment, and either—

(a) appears to the court to be not less than twelve years of age ; or

(b) is proved to have been previously convicted of an offence punishable with penal servitude or imprisonment,

Commitment of offenders between twelve and sixteen years of age to reformatory schools.

the court may, in addition to or in lieu of sentencing him according to law to any punishment, order that he be sent to a certified reformatory school, and be there detained for a period of not less than three and not more than five years, so, however, that the period is such as will in the opinion of the court expire at or before the time at which the offender will attain the age of nineteen years.

2. Without prejudice to any other powers of the court, the court may direct that the offender be taken to prison, or to any other place, not being a prison, which the court thinks fit, and the occupier of which is willing to receive him, and be detained therein for any time not exceeding seven days, or in case of necessity for a period not exceeding fourteen days, or until an order is sooner made for his discharge or for his being sent to a reformatory school, or otherwise dealt with under this or any other Act ; and the person to whom the order is addressed is hereby empowered and required to detain him accordingly, and if the offender escapes he may be apprehended without warrant and brought back to the place of detention.

Power to remand youthful offenders.

3. In the application of this Act to Scotland the expression "court of summary jurisdiction" shall mean the sheriff or any two justices of the peace, or any magistrate or magistrates who have jurisdiction under the Summary Jurisdiction (Scotland) Acts sitting in open court.

Application to Scotland.

4. Section fourteen of the Reformatory Schools Act, 1866, from the beginning of the section to the words "justiciary or sheriff," and the whole of the Reformatory Schools (Scotland) Act, 1893, are hereby repealed, and the said section shall be construed and have effect as if section one of this Act were substituted for the provisions of the said section hereby repealed.

Repeal and construction —29 & 30 Vict. c. 117—56 & 57 Vict. c. 15.

5. This last Act may be cited as "The Reformatory Schools Act, 1893."

Short title.

FERTILISERS AND FEEDING STUFFS ACT, 1893.

56 & 57 VICT. CAP. 56.

An Act to amend the Law with respect to the sale of Agricultural Fertilisers and Feeding Stuff.—[22nd September, 1893.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Warranty
on sale of
fertiliser.

1. (1.) Every person who sells for use as a fertiliser of the soil any article manufactured in the United Kingdom or imported from abroad shall give to the purchaser an invoice stating the name of the article and whether it is an artificially compounded article or not, and what is at least the percentage of the nitrogen, soluble and insoluble phosphates, and potash, if any, contained in the article, and this invoice shall have effect as a warranty by the seller of the statements contained therein.

(2.) For the purposes of this section an article shall be deemed to be manufactured if it has been subjected to any artificial process.

(3.) This section shall not apply to a sale where the whole amount sold at the same time weighs less than half a hundredweight.

Warranty on
sale of feeding
stuff.

2. (1.) Every person who sells for use as food for cattle any article which has been artificially prepared shall give to the purchaser an invoice stating the name of the article and whether it has been prepared from one substance or seed, or from more than one substance or seed, and this invoice shall have effect as a warranty by the seller of the statements contained therein.

(2.) Where any article sold for use as food for cattle is sold under a name or description implying that it is prepared from any particular substance, or from any two or more particular substances, or is the product of any particular seed, or of any two or more particular seeds, and without any indication that it is mixed or compounded with any other substance or seed, there shall be implied a warranty by the seller that it is pure, that is to say, is prepared from that substance or those substances only, or is a product of that seed or those seeds only.

(3.) On the sale of any article for use as food for cattle there shall be implied a warranty by the seller that the article is suitable for feeding purposes.

(4.) Any statement by the seller of the percentages of nutritive and other ingredients contained in any article sold for use as food for cattle, made after the commencement of this Act in an invoice of such article or in any circular or advertisement descriptive of such article, shall have effect as a warranty by the seller.

Penalties for
breach of duty
by seller.

3. (1.) If any person who sells any article for use as a fertiliser of the soil or as food for cattle commits any of the following offences, namely :—

(a.) Fails without reasonable excuse to give, on or before or as soon as possible after the delivery of the article, the invoice required by this Act ; or

(b.) Causes or permits any invoice or description of the article sold by him to be false in any material particular to the prejudice of the purchaser ; or

(c.) Sells for use as food for cattle any article which contains any ingredient deleterious to cattle, or to which has been added any in-

gradient worthless for feeding purposes and not disclosed at the 56 & 57 Vict. time of the sale :
c. 56.

he shall, without prejudice to any civil liability, be liable, on summary conviction, for a first offence to a fine not exceeding twenty pounds, and for any subsequent offence to a fine not exceeding fifty pounds. *Fertilisers and Feeding Stuffs Act, 1893.*

(2.) In any proceeding for an offence under this section it shall be no defence to allege that the buyer, having bought only for analysis, was not prejudiced by the sale.

(3.) A person alleged to have committed an offence under this section in respect of an article sold by him shall be entitled to the same rights and remedies, civil or criminal, against the person from whom he bought the article as are available to the person who bought the article from him, and any damages recovered by him may, if the circumstances justify it, include the amount of any fine and costs paid by him on conviction under this section, and the costs of and incidental to his defence on such conviction.

4. (1.) The Board of Agriculture shall appoint a chief agricultural analyst (hereafter referred to as the chief analyst), who shall have such remuneration out of moneys provided by Parliament as the Treasury may assign. The chief analyst shall not while holding his office engage in private practice. *Power to appoint analysts.*

(2.) Every county council shall, and the council of any county borough may, appoint or concur with another council or other councils in appointing for the purposes of this Act a district agricultural analyst (hereafter referred to as a district analyst) for its county or borough, or a district comprising the counties or boroughs of the councils so concurring. The remuneration of any such district analyst shall be provided by the council, or in the case of a joint appointment by the respective councils in such proportions as they may agree, and shall be paid, in the case of a county, as general expenses, and, in the case of a county borough, out of the borough fund or borough rate. The appointment shall be subject to the approval of the Board of Agriculture. Provided that no person shall, while holding the office of district analyst, engage in any trade, manufacture, or business connected with the sale or importation of articles used for fertilising the soil or as food for cattle.

5. (1.) Every buyer of any article used for fertilising the soil or as food for cattle shall, on payment to a district analyst of a fee sanctioned by the body who appointed the analyst, be entitled, within ten days after delivery of the article to the buyer or receipt of the invoice by the buyer, whichever is later, to have the article analysed by the analyst, and to receive from him a certificate of the result of his analysis. *Power for purchaser to have fertiliser or feeding stuff analysed.*

(2.) Where a buyer of an article desires to have the article analysed in pursuance of this section, he shall, in accordance with regulations made by the Board of Agriculture, take three samples of the article, and shall in accordance with the said regulations cause each sample to be marked, sealed, and fastened up, and shall deliver or send by post one sample with the invoice or a copy thereof to the district analyst, and shall give another sample to the seller, and shall retain the third sample for future comparison: Provided that a district analyst, or some person authorised by him in that behalf with the approval of the body who appointed the analyst, shall, on request either by the buyer or by the seller, and on payment of a fee sanctioned by the said body, take the samples on behalf of the buyer.

(3.) The certificate of the district analyst shall be in such form and

56 & 57 VICT. contain such particulars as the Board of Agriculture direct, and every district analyst shall report to the Board as they direct the result of any analysis made by him in pursuance of this Act.

Fertilisers and Feeding Stuffs Act, 1893.

(4.) If the seller or the buyer objects to the certificate of the district analyst, one of the samples selected, or another sample selected in like manner, may, at the request of the seller, or, as the case may be, the buyer, be submitted with the invoice or a copy thereof to the chief analyst, and the seller, or, as the case may be, the buyer, shall, on payment of a fee sanctioned by the Treasury, be entitled to have the sample analysed by the chief analyst, and to receive from him a certificate of the result of his analysis.

(5.) At the hearing of any civil or criminal proceeding with respect to any article analysed in pursuance of this section, the production of a certificate of the district analyst, or if a sample has been submitted to the chief analyst, then of the chief analyst, shall be sufficient evidence of the facts therein stated, unless the defendant person charged requires that the analyst be called as a witness.

(6.) The costs of and incidental to the obtaining of any analysis in pursuance of this section shall be borne by the seller or the buyer in accordance with the results of the analysis, and shall be recoverable as a simple contract debt.

Penalty for tampering.

6. If any person knowingly and fraudulently—

(a) tampers with any parcel of fertiliser or feeding stuff so as to procure that any sample of it taken in pursuance of this Act does not correctly represent the contents of the parcel; or

(b) tampers with any sample taken under this Act; he shall be liable on summary conviction to a fine not exceeding twenty pounds, or to imprisonment for a term not exceeding six months.

Prosecutions and appeals.

7. (1) A prosecution for an offence under this Act may be instituted either by the person aggrieved, or by the council of a county or borough, or by any body or association authorised in that behalf by the Board of Agriculture, but in the case of an offence under section three shall not be instituted by the person aggrieved or by any body or association except on a certificate by the Board of Agriculture that there is reasonable ground for the prosecution.

(2.) Any person aggrieved by a summary conviction under this Act may appeal to a court of quarter sessions.

Construction and application.

8. (1.) For the purposes of this Act the expression "cattle" shall mean bulls, cows, oxen, heifers, calves, sheep, goats, swine, and horses; and the expressions "soluble" and "insoluble" shall respectively mean soluble and insoluble in water.

(2.) This Act shall apply to wholesale as well as retail sales.

Application to Scotland—
52 & 53 Vict.
c. 50.

9. In the application of this Act to Scotland—

(1.) The expression "council of any county borough" shall mean the magistrates and town council of a burgh, and the duties and powers of councils of counties and county burghs shall be performed and be exercisable in a county by the county councils or district committees thereof, and in a burgh by the magistrates and town council, and the remuneration of district analysts appointed under this Act shall be paid in the case of a county out of the consolidated rate, and in the case of a burgh out of the police or burgh general assessment.

(2.) The expression "burgh" means a burgh which returns or contributes to return a member to Parliament, not being a burgh to which section fourteen of the Local Government (Scotland) Act, 1889, applies.

(8.) Penalties for offences under this Act may be recovered summarily 56 & 57 Vict. before the sheriff in manner provided by the Summary Jurisdiction Acts, a 56. and any person aggrieved by a summary conviction may appeal therefrom in accordance with the provisions of those Acts. *Fertilisers and Feeding Stuffs Act, 1893.*

10. For the purposes of the execution of this Act in Ireland, inclusive of the appointment of a chief agricultural analyst, the Lord Lieutenant acting by the advice of the Privy Council shall be substituted for the Board of Agriculture, and the district analysts shall be the analysts appointed for counties and boroughs in Ireland under the Sale of Food and Drugs Act, 1875, and the additional remuneration of such analysts for their duties under this Act shall be provided in manner directed by the said Act of 1875, and any Act amending the same. *Application to Ireland— 38 & 39 Vict. c. 63.*

11. This Act shall come into operation on the first day of January, one thousand eight hundred and ninety-four. *Commencement of Act.*

12. This Act may be cited as "The Fertilisers and Feeding Stuffs Act, Short title. 1893."

**STATUTES AND PARTS OF STATUTES
AFFECTING THE CRIMINAL LAW,
PASSED IN THE SESSION OF PARLIAMENT OF 1894**

QUARTER SESSIONS ACT, 1894.

57 VICT. CAP. 6.

An Act for amending the Law with respect to the time for holding Quarter Sessions.—[1st June, 1894.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Power to alter
time for hold-
ing quarter
sessions.

1. The justices assembled in general quarter sessions, or at any adjourned or special meeting thereof (which special meeting they are hereby authorised to hold) may at any time when it may appear desirable for the purpose of not interfering with the assize then next ensuing, fix or alter the time for holding the then next general quarter sessions so as the sessions be held not earlier than fourteen days before nor later than fourteen days after the week in which they would otherwise be held.

Repeal.

2. The Act of the session of the fourth and fifth years of the reign of King William the Fourth, chapter forty-seven, intituled "An Act for preventing the interference of the spring assize with the April quarter sessions," is hereby repealed.

Short title.

3. This Act may be cited as "The Quarter Sessions Act, 1894."

MERCHANDISE MARKS (PROSECUTIONS) ACT, 1894.

57 & 58 VICT. CAP. 19.

An Act for enabling the Board of Agriculture to undertake Prosecutions in certain cases under the Merchandise Marks Act, 1887.—[20th July, 1894.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Power of
Board of Agri-
culture to
prosecute in
certain cases
—54 & 55

1. The powers exerciseable by the Board of Trade under the Merchandise Marks Act, 1891, with respect to the prosecution of offences under the Merchandise Marks Act, 1887, may in cases which appear to the Board of Agriculture to relate to agricultural or horticultural produce be

exercised by that Board, and in such cases the former Act shall apply as if the Board of Agriculture were referred to therein instead of the Board of Trade.

2. This Act shall not extend to Ireland.

3. This Act may be cited as "The Merchandise Marks (Prosecutions) Act, 1894," and shall be read with the Merchandise Marks Acts, 1887 and 1891.

*Merchandise
Marks (Pro-
secutions) Act,*
1894.

Vict. c. 15—
50 & 51 Vict.
c. 28. (a)
Extent of Act.
Short title.

WILD BIRDS PROTECTION ACT, 1894.

57 & 58 VICT. CAP. 24.

An Act to amend the Wild Birds Protection Act, 1880.—[20th July, 1894.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may for all purposes be cited as "The Wild Birds Protection Act, 1894," and shall be construed as one with the Wild Birds Protection Act, 1880 (hereinafter referred to as "the principal Act"), except as hereinafter provided.

2. A Secretary of State may, after the passing of this Act, upon application by the county council of any administrative county by order prohibit—

- (1.) The taking or destroying of wild birds eggs in any year or years in any place or places within that county; or
- (2.) The taking or destroying the eggs of any specified kind of wild birds within that county or part or parts thereof as recommended by the said county council and set forth in the said order.
- (3.) The application by the county council shall specify the limits of the place or places, or otherwise, the particular species of wild birds to which it is proposed that any prohibition in the order is to apply, and shall set forth the reasons on account of which the application is made.

3. A Secretary of State may, on the representation of the council of any administrative county, order that the principal Act shall apply within that county or any part or parts thereof to any species of wild bird not included in the schedule of that Act, as if that species of wild bird were included in the schedule of that Act, and on the making of such order that Act shall apply.

4. (1.) The council of an administrative county shall in every year give public notice of any order under this Act which is in force in any place within their county during the three weeks preceding the commencement of the period of the year during which the order operates.

(2.) Public notice under this section shall be given—

- (a.) As regards each place in which an order operates, by advertising the order in two local newspapers circulating in or near that place;
- (b.) By fixing notice of the order in conspicuous spots within and near each place in which the order operates; and

(a) For 50 & 51 Vict. c. 28, see 16 Cox O. C. xvii. (App.)

(b) For 43 & 44 Vict. c. 35, see 14 Cox O. C. xxxvii. (App.)

Short title and
construction
—43 & 44
Vict. c. 35. (b)

Prohibition of
taking or
destroying
eggs.

Order as to
application of
principal Act
to other birds.

Publication of
order.

- 57 & 58 Vict. c. 24.
 —
Wild Birds Protection Act, 1894.
 —
 Penalties.
- (c.) In such other manner as the Secretary of State may direct, or as the council may think expedient, with a view to making the order known to the public.
5. Any person who, after the passing of this Act, shall take or destroy or incite any other person to take or destroy—
- (a.) The eggs of any wild birds within any area specified in the order :
 or
 (b.) The eggs of any species of wild bird named in the order, shall, on conviction before any two justices of the peace in England, Wales, or Ireland, or before the sheriff in Scotland, forfeit and pay for every egg so taken or destroyed a sum not exceeding one pound.
- Expenses—
 51 & 52 Vict. c. 41—52 & 53 Vict. c. 50.
6. Any expenses incurred by the council of a county under this Act may be defrayed by that council as expenses for general county purposes within the meaning of the Local Government Act, 1888, or, so far as respects Scotland, the Local Government (Scotland) Act, 1889.
- Application to Scotland and Ireland.
7. (1) This act shall apply to Scotland with the substitution of the Secretary for Scotland for a Secretary of State.
 (2.) This Act shall apply to Ireland with the substitution of the Lord-Lieutenant for a Secretary of State, and of the grand jury for the council of an administrative county, and any expenses incurred in carrying this Act into effect in Ireland shall be defrayed out of grand jury cess.

INDUSTRIAL SCHOOLS ACTS AMENDMENT ACT, 1894.

57 & 58 VICT. CAP. 33.

An Act to further amend the Industrial Schools Act, 1866. — [17th August, 1894.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Supervision of children after discharge from industrial schools—
 29 & 30 Vict. c. 118.

1. (1.) Every child sent to an industrial school after the passing of this Act shall, from the expiration of the period of his detention at such school, remain up to the age of eighteen under the supervision of the managers of the school.

(2.) The managers may grant to any child under their supervision a licence in the manner provided by section twenty-seven of the Industrial Schools Act, 1866, and may revoke any such licence, and recall the child to the school ; and any child so recalled may be detained in the school for a period not exceeding three months, and may at any time be again placed out on licence. Provided that—

- (a.) a child shall not be so recalled unless the managers are of opinion that the recall is necessary for the protection of the child ; and
 (b.) the managers shall send to the Secretary of State an immediate notification of the recall of any child, and shall state the reasons for the recall ; and
 (c.) they shall again place the child out as soon as possible, and at latest within three months after the recall, and shall forthwith notify the Secretary of State that the child has been placed out.

(3.) A licence granted to a child within three months before attaining the age of sixteen shall continue in force after the child attains that age, and may be revoked or renewed in the manner provided by section twenty-seven of the Industrial Schools Act, 1866. 57 & 58 Vict. c. 33.

2. Section thirty-four of the Industrial Schools Act, 1866, shall be read and construed as if after the three offences therein severally specified there were added the following offence; namely,—

*Industrial
Schools Acts
Amendment
Act, 1894.*

FOURTH.—Knowingly assists or induces, directly or indirectly, a child placed on licence to escape from any person with whom the child is so placed on licence, or prevents the child from returning to any person aforesaid. Penalty for inducing child placed on licence to escape, &c.

3. Any child detained in an industrial school at the passing of this Act may consent in writing to come under the provisions of this Act, and thereupon the Secretary of State, if satisfied that the consent was given voluntarily, and with full knowledge of its effect, may order that the provisions of this Act shall apply to the child, and they shall apply accordingly. Provision as to children detained under existing orders.

4. Nothing in this Act shall apply to any child committed to an industrial school under the Elementary Education Acts, 1870 to 1893. Saving for children detained under attendance order.

5. This Act may be cited for all purposes as “The Industrial Schools Act Amendment Act, 1894,” and shall be construed as one with the Industrial Schools Act, 1866, and that Act and this Act may be cited together as “The Industrial Schools Acts, 1866 and 1894.” Short title and construction.

PREVENTION OF CRUELTY TO CHILDREN ACT, 1894.

57 & 58 Vict. CAP. 41.

An Act to consolidate the Acts relating to the Prevention of Cruelty to, and Protection of, Children.—[17th August, 1894.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Cruelty to Children.

1. (1.) If any person over the age of sixteen years who has the custody, charge, or care of any child under the age of sixteen years, wilfully assaults, ill-treats, neglects, abandons, or exposes such child, or causes or procures such child to be assaulted, ill-treated, neglected, abandoned, or exposed in a manner likely to cause such child unnecessary suffering, or injury to its health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanour; and Punishment for cruelty to children.

(a) on conviction on indictment, shall be liable, at the discretion of the court, to a fine not exceeding one hundred pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding two years: and

57 & 58 Vict.
c 41.

*Prevention of
Cruelty to
Children Act,
1894.*

(b) on summary conviction shall be liable, at the discretion of the court to a fine not exceeding twenty-five pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour for any term not exceeding six months.

(2.) A person may be convicted of an offence under this section either on indictment or by a court of summary jurisdiction notwithstanding the death of the child in respect of whom the offence is committed.

(3.) If it is proved that a person indicted under this section was interested in any sum of money accruable or payable in the event of the death of the child, and had knowledge that such sum of money was accruing or becoming payable, the court, in its discretion, may

(a) increase the amount of the fine under this section so that the fine does not exceed two hundred pounds; or

(b) in lieu of awarding any other penalty under this section, sentence the person indicted to penal servitude for any term not exceeding five years.

(4.) A person shall be deemed to be interested in a sum of money under this section if he has any share in or any benefit from the payment of that money, though he is not a person to whom it is legally payable.

(5.) An offence under this section is in this Act referred to as an offence of cruelty.

Restrictions on Employment of Children.

*Restrictions
on employ-
ment of chil-
dren.*

2. If any person—

(a) causes or procures any child, being a boy under the age of fourteen years, or being a girl under the age of sixteen years, or, having the custody, charge, or care of any such child, allows that child to be in any street, premises, or place for the purpose of begging or receiving alms, or of inducing the giving of alms, whether under the pretence of singing, playing, performing, offering anything for sale, or otherwise; or

(b) causes or procures any child, being a boy under the age of fourteen years, or being a girl under the age of sixteen years, or, having the custody, charge, or care of any such child, allows that child to be in any street, or in any premises licensed for the sale of any intoxicating liquor, other than premises licensed according to law for public entertainments, for the purpose of singing, playing, or performing for profit, or offering anything for sale, between nine p.m. and six a.m.; or

(c) causes or procures any child under the age of eleven years, or, having the custody, charge, or care of any such child, allows that child to be at any time in any street, or in any premises licensed for the sale of any intoxicating liquor, or in premises licensed according to law for public entertainments, or in any circus or other place of public amusement to which the public are admitted by payment, for the purpose of singing, playing, or performing for profit, or offering anything for sale; or

(d) causes or procures any child under the age of sixteen years, or, having the custody, charge, or care of any such child, allows that child to be in any place for the purpose of being trained as an acrobat, contortionist, or circus performer, or of being trained for any exhibition or performance which in its nature is dangerous, that person shall, on summary conviction, be liable, at the discretion of the

court, to a fine not exceeding twenty-five pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding three months.

Provided that—

- (i.) This section shall not apply in the case of any occasional sale or entertainment the net proceeds of which are wholly applied for the benefit of any school or to any charitable object, if such sale or entertainment is held elsewhere than in premises which are licensed for the sale of any intoxicating liquor but not licensed according to law for public entertainments, or if, in the case of a sale or entertainment held in any such premises as aforesaid, a special exemption from the provisions of this section has been granted in writing under the hands of two justices of the peace; and
- (ii.) Any local authority may, if they think it necessary or desirable so to do, from time to time by bye-law extend or restrict the hours mentioned in paragraph (b) of this section, either on every day or on any specified day or days of the week, and either as to the whole of their district or as to any specified area therein; and
- (iii.) Paragraphs (c) and (d) of this section shall not apply in any case in respect of which a licence granted under this Act is in force, so far as that licence extends; and
- (iv.) Paragraph (d) of this section shall not apply in the case of a person who is the parent or legal guardian of a child, and himself trains the child.

3. (1.) A petty sessional court, or in Scotland the School Board, may, notwithstanding anything in this Act, grant a licence for such time and during such hours of the day, and subject to such restrictions and conditions as the court or board think fit, for any child exceeding seven years of age,—

- (a) to take part in any entertainment or series of entertainments to take place in premises licensed according to law for public entertainments, or in any circus or other place of public amusement as aforesaid; or
- (b) to be trained as aforesaid; or
- (c) for both purposes;

if satisfied of the fitness of the child for the purpose, and if it is shown to their satisfaction that proper provision has been made to secure the health and kind treatment of the children taking part in the entertainment or series of entertainments or being trained as aforesaid, and the court or board may, upon sufficient cause, vary, add to, or rescind any such licence.

Any such licence shall be sufficient protection to all persons acting under or in accordance with the same.

(2.) A Secretary of State may assign to any inspector appointed under section twenty-seven of the Factory and Workshop Act, 1878, specially and in addition to any other usual duties, the duty of seeing whether the restrictions and conditions of any licence under this section are duly complied with, and any such inspector shall have the same power to enter, inspect, and examine any place of public entertainment at which the employment of a child is for the time being licensed under this section as an inspector has to enter, inspect, and examine a factory or workshop under section sixty-eight of the same Act.

(3.) Where any person applies for a licence under this section he shall, at least seven days before making the application, give notice thereof to

57 & 58 Vict.
c. 41.

*Prevention of
Cruelty to
Children Act,
1894.*

Licences for
employment
of children—
41 & 42 Vict.
c. 16—39 & 40
Vict. c. 79—
41 & 42 Vict.
c. 78.

57 & 58 Vict. c. 41. the chief officer of police for the district in which the licence is to take effect, and that officer may appear or instruct some person to appear before the authority hearing the application, and show cause why the licence should not be granted, and the authority to whom the application is made shall not grant the same unless they are satisfied that notice has been properly given.

Prevention of Cruelty to Children Act, 1894.

(4.) Where a licence is granted under this section to any person, that person shall, not less than ten days after the granting of the licence, cause a copy thereof to be sent to the inspector of factories and workshops acting for the district in which the licence is to take effect, and if he fails to cause such copy to be sent shall be liable on summary conviction to a fine not exceeding five pounds.

(5.) Nothing in this or in the last preceding section shall affect the provisions of the Elementary Education Act, 1876, or the Education (Scotland) Act, 1878.

Arrest of Offender and Provisions for Safety of Children.

Power to take offenders into custody.

4. (1.) Any constable may take into custody, without warrant, any person—

(a) who within view of such constable commits an offence under this Act, or any of the offences mentioned in the Schedule to this Act, where the name and residence of such person are unknown to such constable and cannot be ascertained by such constable; or

(b) who has committed or who he has reason to believe has committed any offence of cruelty within the meaning of this Act, or any of the offences mentioned in the Schedule to this Act, if he has reasonable ground for believing that such person will abscond, or if the name and address of such person are unknown to and cannot be ascertained by the constable.

(2.) Where a constable arrests any person without warrant in pursuance of this section, the inspector or constable in charge of the station to which such person is conveyed shall, unless in his belief the release of such person on bail would tend to defeat the ends of justice, or to cause injury or danger to the child against whom the offence is alleged to have been committed, release the person arrested on his entering into such recognisance, with or without sureties, as may in his judgment be required to secure the attendance of such person upon the hearing of the charge.

Detention of child in place of safety.

5. (1.) A constable may take to a place of safety any child in respect of whom an offence under paragraph (a) of section two of this Act has been committed, or in respect of whom an offence of cruelty within the meaning of this Act, or any of the offences mentioned in the Schedule to this Act has been, or there is reason to believe has been, committed.

(2.) A child so taken to a place of safety, and also any child under the age of sixteen years who seeks refuge in a place of safety, may there be detained until it can be brought before a court of summary jurisdiction, and that court may make such order as is mentioned in the next following sub-section, or may cause the child to be dealt with as circumstances may admit and require until the charge made against any person in respect of any offence as aforesaid with regard to the child has been determined by the committal for trial, or conviction, or discharge of such person.

(3.) Where it appears to a court of summary jurisdiction or any justice that an offence of cruelty within the meaning of this Act or any of the

offences mentioned in the Schedule to this Act has been committed in the case of any child that is brought before such court or justice, and that the health or safety of the child will be endangered unless an order is made under this sub-section, the court or justice may, without prejudice to any other power under this Act, make such order as circumstances require for the care and detention of the child until a reasonable time has elapsed for a charge to be made against some person for having committed the offence, and, if a charge is made against any person within that time, until the charge has been determined by the committal for trial or conviction or discharge of that person, and any such order may be carried out notwithstanding that any person claims the custody of the child.

(4.) Boards of guardians, and, in Scotland, parochial boards, shall provide for the reception of children brought to a workhouse in pursuance of this Act, and where the place of safety to which a constable takes a child is a workhouse, the master shall receive the child into the workhouse if there is suitable accommodation therein for the same, and shall detain the child until the case is determined, and any expenses incurred in respect of the child shall be deemed to be expenses incurred in the relief of the poor.

6. (1.) Where a person having the custody, charge, or care of a child under the age of sixteen years has been—

(a) convicted of committing in respect of such child an offence of cruelty within the meaning of this Act, or any of the offences mentioned in the Schedule to this Act; or

(b) committed for trial for any such offence; or

(c) bound over to keep the peace towards such child,

by any court, that court either at the time when the person is so convicted, committed for trial, or bound over, and without requiring any new proceedings to be instituted for the purpose, or at any other time, and also any petty sessional court before which any person may bring the case, may, if satisfied on inquiry that it is expedient so to deal with the child, order that the child be taken out of the custody of the person so convicted, committed for trial, or bound over, and be committed to the custody of a relation of the child, or some other fit person named by the court (such relation or other person being willing to undertake such custody), until it attains the age of sixteen years, or for any shorter period, and may of its own motion or on the application of any person from time to time renew, vary, and revoke any such order; but no order shall be made under this section unless a parent of the child has been convicted of or committed for trial for the offence, or is under committal for trial for having been or has been proved to have been party or privy to the offence, or has been bound over to keep the peace towards such child.

(2.) Every order under this section shall be in writing, and any such order may be made by the court in the absence of the child; and the consent of any person to undertake the custody of a child in pursuance of any such order shall be proved in such manner as the court may think sufficient to bind him.

(3.) Where an order is made under this section in respect of a person who has been committed for trial, then, if that person is acquitted of the charge, or if the charge is dismissed for want of prosecution, the order shall forthwith be void except with regard to anything that may have been lawfully done under it.

(4.) A Secretary of State in England, and in Scotland the Secretary for

57 & 58 Vict.
c 41.

*Prevention of
Cruelty to
Children Act,
1894.*

Disposal of
child by order
of court.

57 & 58 Vict.
c. 41.

*Prevention of
Cruelty to
Children Act,
1894.*

Maintenance
of child when
committed to
custody of any
person under
order of court
—35 & 36
Vict. c. 65.

Religious per-
suasion of
person to
whom child is
committed.

Scotland, and in Ireland the Lord-Lieutenant of Ireland, may at any time in his discretion discharge a child from the custody of any person to whose custody it is committed in pursuance of this section, either absolutely or on such conditions as such Secretary of State, Secretary, or Lord-Lieutenant, approves, and may, if he think fit, make rules in relation to children so committed to the custody of any person, and to the duties of such persons with respect to such children.

(5.) A Secretary of State, in any case where it appears to him to be for the benefit of a child who has been committed to the custody of any person in pursuance of this section, may empower such person to procure the emigration of the child, but except with such authority, no person to whose custody a child is so committed shall procure its emigration.

7. (1.) Any person to whose custody a child is committed under this Act shall, whilst the order is in force, have the like control over the child as if he were its parent, and shall be responsible for its maintenance, and the child shall continue in the custody of such person, notwithstanding that it is claimed by its parent.

(2.) Any court having power so to commit a child shall have power to make the like orders on the parent of the child to contribute to its maintenance during such period as aforesaid, as if the child were detained under the Industrial Schools Acts, but the limit on the amount of the weekly sum which the parent of a child may be required, under this section, to contribute to its maintenance shall be one pound a week instead of the limit fixed by the Industrial Schools Acts.

(3.) Any such order may be made on the complaint or application of the person to whose custody the child is for the time being committed, and either at the time when the order for the child's committal to custody is made, or subsequently, and the sums contributed by the parent shall be paid to such person as the court may name, and be applied for the maintenance of the child.

(4.) If a person fails to pay any sum payable by him in pursuance of any such order, he may be dealt with in like manner as if the sum were due from him in pursuance of an order under the Bastardy Law Amendment Act, 1872, or in Scotland were a sum decreed for ailment, or in Ireland were a sum ordered to be paid by him under the Summary Jurisdiction (Ireland) Acts.

(5.) Where an order under this Act to commit a child to the custody of some relation or other person is made in respect of a person who has been committed for trial for an offence, the court shall not have power to order the parent of the child to contribute to its maintenance prior to the trial of that person.

8. (1.) In determining on the person to whose custody the child shall be committed under this Act, the court shall endeavour to ascertain the religious persuasion to which the child belongs, and shall, if possible, select a person of the same religious persuasion, or a person who gives such undertaking as seems to the court sufficient that the child shall be brought up in accordance with its own religious persuasion, and such religious persuasion shall be specified in the order.

(2.) In any case where the child has been placed pursuant to any such order with a person who is not of the same religious persuasion as that to which the child belongs or who has not given such undertaking as aforesaid the court shall, on the application of any person in that behalf, and on its appearing that a fit person who is of the same religious persuasion or who will give such undertaking as aforesaid, is willing to undertake

the custody, make an order to secure his being placed with a person who either is of the same religious persuasion or gives such undertaking as aforesaid. 57 & 58 Vict. c. 41.

(3.) Where a child has been placed with a person who gives such undertaking as aforesaid, and the undertaking is not observed, the child shall be deemed to have been placed with a person not of the same religious persuasion as that to which the child belongs as if no such undertaking had been given.

*Prevention of
Cruelty to
Children Act,
1894.*

9. (1.) Where any child under the age of sixteen years is brought before a petty sessional court under circumstances authorising the court to deal with the child under the Industrial Schools Acts, the court, if it thinks fit, in lieu of ordering that the child be sent to an industrial school, may make an order under this Act for the committal of the child to the custody of a relation or person named by the court. Interchange of powers under Industrial Schools Acts and this Act.

(2.) Where a court orders a child to be sent to an industrial school, the order may, at the discretion of the court, be made to take effect either immediately or at any later time specified therein, regard being had to the age or health of the child; and, if the order is not made to take effect immediately, or if at the time specified for the order to take effect the child is deemed unfit to be sent to an industrial school, the court may commit the child to the custody of a relation or person named by the court, as provided by this Act, until the time so specified or the time when the order actually takes effect.

10. (1.) If it appears to any stipendiary magistrate or to any two justices of the peace, on information made before him or them on oath by any person who, in the opinion of the magistrate or justices, is *bona fide* acting in the interests of a child under the age of sixteen years, that there is reasonable cause to suspect that such a child has been or is being assaulted, ill-treated, or neglected in any place within the jurisdiction of such magistrates or justices in a manner likely to cause the child unnecessary suffering or to be injurious to its health, or that any offence mentioned in the Schedule to this Act has been or is being committed in respect of such a child, such magistrate or justices may issue a warrant authorising any person named therein to search for such child, and if it is found to have been or to be assaulted, ill-treated, or neglected in manner aforesaid, or that any such offence as aforesaid has been or is being committed in respect of the child, to take it to and detain it in a place of safety, until it can be brought before a court of summary jurisdiction, or authorising any person to remove the child with or without search to a place of safety and detain it there until it can be brought before a court of summary jurisdiction; and the court before whom the child is brought may cause it to be dealt with in the manner provided by section five of this Act. Warrant to search for and remove a child.

Provided that—

- (a) the powers hereinbefore conferred on any two justices may be exercised by any one justice, if upon the information it appears to him to be a case of urgency; and
- (b) in the case of Scotland the jurisdiction hereby conferred on a magistrate or two justices shall be exercised only by a sheriff or sheriff substitute.

(2.) Any person issuing a warrant under this section may by the same warrant cause any person accused of any offence in respect of the child to be apprehended and brought before a justice, and proceedings to be taken for punishing such person according to law.

57 & 58 Vict.
c. 41.

*Prevention of
Cruelty to
Children Act,
1894.*

(3.) Any person authorised by warrant under this section to search for any child, or to remove any child with or without search, may enter (if need be by force) any house, building, or other place specified in the warrant, and may remove the child therefrom.

(4.) Every warrant issued under this section shall be addressed to and executed by some superintendent, inspector, or other superior officer of police, who shall be accompanied by the person making the information, if such person so desire, unless the persons by whom the warrant is issued otherwise direct, and may also, if the persons by whom the warrant is issued so direct, be accompanied by a registered medical practitioner.

(5.) It shall not be necessary in any information or warrant under this section to name the child.

Power as to Habitual Drunkards.

Power as to
habitual
drunkards—
—42 & 43
Vict. c. 19—
51 & 52 Vict.
c. 19.

11. Where it appears to the court by or before which any person is convicted of the offence of cruelty within the meaning of this Act, or of any of the offences mentioned in the Schedule to this Act, that that person is a parent of the child in respect of whom the offence was committed, or is living with the parent of the child, and is an habitual drunkard within the meaning of the Inebriates Acts, 1879 and 1888, the court, in lieu of sentencing such person to imprisonment, may, if it thinks fit, make an order for his detention for any period named in the order not exceeding twelve months in a retreat under the said Acts, the licensee of which is willing to receive him, and the said order shall have the like effect, and copies thereof shall be sent to the local authority and Secretary of State in like manner as if it were an application duly made by such person and duly attested by two justices under the said Acts; and the court may order an officer of the court or constable to remove such person to the retreat, and on his reception the said Acts shall have effect as if he had been admitted in pursuance of an application so made and attested as aforesaid: Provided that—

- (a) an order for the detention of a person in a retreat shall not be made under this section unless that person, having had such notice as the court deems sufficient of the intention to allege habitual drunkenness, consents to the order being made; and
- (b) if the wife or husband of such person, being present at the hearing of the charge, objects to the order being made, the court shall, before making the order, take into consideration any representation made to it by the wife or husband; and
- (c) before making the order the court shall, to such extent as it may deem reasonably sufficient, be satisfied that provision will be made for defraying the expenses of such person during detention in a retreat.

Evidence and Procedure.

Evidence of
accused
person.

12. In any proceeding against any person for an offence under this Act or for any of the offences mentioned in the Schedule to this Act, such person shall be competent but not compellable to give evidence, and the wife or husband of such person may be required to attend to give evidence as an ordinary witness in the case, and shall be competent but not compellable to give evidence.

Extension of
power to take
deposition of
child.

13. (1.) Where a justice is satisfied by the evidence of a registered medical practitioner that the attendance before a court of any child, in respect of whom an offence of cruelty within the meaning of this Act or

any of the offences mentioned in the Schedule to this Act is alleged to have been committed, would involve serious danger to its life or health, the justice may take in writing the deposition of such child on oath, and shall thereupon subscribe the same and add thereto a statement of his reason for taking the same, and of the day when and place where the same was taken, and of the names of the persons (if any) present at the taking thereof.

57 & 58 Vict.
c. 41.
*Prevention of
Cruelty to
Children Act,
1894.*

(2.) The justice taking any such deposition shall transmit the same with his statement—

- (a) if the deposition relates to an offence for which any accused person is already committed for trial, to the proper officer of the court for trial at which the accused person has been committed; and
- (b) in any other case to the clerk of the peace of the county or borough in which the deposition has been taken;

and the clerk of the peace to whom such deposition is transmitted shall preserve, file, and record the same.

14. Where on the trial of any person on indictment for any offence of cruelty within the meaning of this Act or any of the offences mentioned in the Schedule to this Act, the court is satisfied by the evidence of a registered medical practitioner that the attendance before the court of any child in respect of whom the offence is alleged to have been committed would involve serious danger to its life or health, any deposition of the child taken under the Indictable Offences Act, 1848, or the Indictable Offences (Ireland) Act, 1849, or the Petty Sessions (Ireland) Act, 1851, or this Act, shall be admissible in evidence either for or against the accused person without further proof thereof—

Admission of
deposition of
child in evi-
dence—
11 & 12 Vict.
c. 42—12 & 13
Vict. c. 69—
14 & 15 Vict.
c. 98.

- (a) if it purports to be signed by the justice by or before whom it purports to be taken; and
- (b) if it is proved that reasonable notice of the intention to take the deposition has been served upon the person against whom it is proposed to use the same as evidence, and that that person or his counsel or solicitor had, or might have had if he had chosen to be present, an opportunity of cross-examining the child making the deposition.

15. (1.) Where in any proceeding against any person for an offence under this Act or for any of the offences mentioned in the Schedule to this Act, the child in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not in the opinion of the court understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the court, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth: and the evidence of such child, though not given on oath but otherwise taken and reduced into writing, in accordance with the provisions of section seventeen of the Indictable Offences Act, 1848, or of section fourteen of the Petty Sessions (Ireland) Act, 1851, or of section thirteen of this Act, shall be deemed to be a deposition within the meaning of those sections respectively:

Evidence of
child of tender
years—
11 & 12 Vict.
c. 42—14 & 15
Vict. c. 93—
42 & 48 Vict.
c. 49—47 & 48
Vict. c. 19.

Provided that—

- (a.) A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused; and
- (b.) Any child whose evidence is received as aforesaid and who shall

57 & 58 Vict.
c. 41.

*Prevention of
Cruelty to
Children Act,
1894.*

Power to pro-
ceed with case
in absence of
child.

Presumption
of age of child.

Mode of
charging
offences and
limitation of
time.

Appeal from
summary con-
viction to
quarter
sessions—
38 & 39 Vict.
c. 62.

Expenses of
prosecution.

wilfully give false evidence shall be liable to be indicted and tried for such offence, and on conviction thereof may be adjudged such punishment as is provided for by section eleven of the Summary Jurisdiction Act, 1879, in the case of juvenile offenders, or in Ireland by section four of the Summary Jurisdiction over Children (Ireland) Act, 1884, in the case of children.

(2.) This section shall not apply to Scotland.

16. Where in any proceedings with relation to an offence of cruelty within the meaning of this Act, or any of the offences mentioned in the Schedule to this Act, the court is satisfied by the evidence of a registered medical practitioner that the attendance before the court of any child in respect of whom the offence is alleged to have been committed would involve serious danger to its life or health, and is further satisfied that the evidence of the child is not essential to the just hearing of the case, the case may be proceeded with and determined in the absence of the child.

17. Where a person is charged with an offence under this Act, or any of the offences mentioned in the Schedule to this Act, in respect of a child who is alleged in the charge or indictment to be under any specified age, and the child appears to the court to be under that age, such child shall for the purposes of this Act be deemed to be under that age, unless the contrary is proved.

18. (1.) Where a person is charged with committing an offence under this Act or any of the offences mentioned in the Schedule to this Act in respect of two or more children, the same information or summons may charge the offence in respect of all or any of them, but the person charged shall not be liable to a separate penalty for each child unless upon separate informations.

(2.) The same information or summons may also charge the offences of assault, ill-treatment, neglect, abandonment, or exposure, together or separately, but when those offences are charged together the person charged shall not be liable to a separate penalty for each.

(3.) A person shall not be summarily convicted of an offence under this Act or of an offence mentioned in the Schedule to this Act unless the offence was wholly or partly committed within six months before the information was laid; but, subject as aforesaid, evidence may be taken of acts constituting, or contributing to constitute, the offence, and committed at any previous time.

(4.) Where an offence under this Act or any offence mentioned in the Schedule to this Act charged against any person is a continuous offence, it shall not be necessary to specify in the information, summons, or indictment the date of the acts constituting the offence.

19. When, in pursuance of this Act, any person is convicted by a court of summary jurisdiction of an offence, and such person did not plead guilty or admit the truth of the information, or when in the case of any application under sections six, seven, or eight of this Act, other than an application to a judge or court of assize, any party thereto thinks himself aggrieved by any order or decision of the court, he may appeal against such a conviction, order, or decision in England and Ireland to a court of quarter sessions, and in Scotland to the High Court of Justiciary, in manner provided by the Summary Prosecutions Appeal (Scotland) Act, 1875, or any Act amending the same.

20. (1.) Where a misdemeanour under this Act is tried on indictment, the expenses of the prosecution shall be defrayed in like manner as in the case of a felony.

(2.) This section shall not apply to Scotland.

21. A board of guardians, or in Scotland the parochial board of any parish or combination, may, out of the funds under their control, pay the reasonable costs and expenses of any proceedings which they have directed to be taken under this Act in regard to the assault, ill-treatment, neglect, abandonment, or exposure of any child, and, in the case of a union, shall charge such costs and expenses to the common fund.

57 & 58 Vict.
c. 41.

*Prevention of
Cruelty to
Children Act,
1894.*

Guardians
may pay costs
of proceedings.

Supplemental.

22. Every bye-law under this Act shall be subject—

- (a.) In England to section one hundred and eighty-four of the Public Health Act, 1875, as if every local authority in England under this Act were a local authority within the meaning of that section, but with the substitution of Secretary of State for the Local Government Board; and
- (b.) In Scotland to so much of section sixty-two of the Public Health (Scotland) Act, 1867, as provides for the confirmation of rules and regulations and the proceedings preliminary to confirmation as if such rules and regulations included bye-laws under this Act, and the local authority under this Act were a local authority within the meaning of that section, but with the substitution of the Secretary for Scotland for the Board of Supervision; and
- (c.) In Ireland to section two hundred and twenty-one of the Public Health (Ireland) Act, 1878, with the substitution of Lord-Lieutenant for the Local Government Board.

Provision as to
bye-laws—
38 & 39 Vict.
c. 55—80 & 31
Vict. c. 101—
41 & 42 Vict.
c. 52.

23. (1.) The provisions of this Act relating to the parent of a child shall apply to the step-parent of the child and to any person cohabiting with the parent of the child, and the expression "parent" when used in relation to a child includes guardian and every person who is by law liable to maintain the child.

Provision as
to parents and
as to meaning
of "custody,
charge, or
care."

(2.) This Act shall apply in the case of a parent who being without means to maintain a child fails to provide for its maintenance under the Acts relating to the relief of the poor, in like manner as if the parent had otherwise neglected the child.

(3.) For the purposes of this Act—

Any person who is the parent of a child shall be presumed to have the custody of the child; and

Any person to whose charge a child is committed by its parent shall be presumed to have charge of the child; and

Any other person having actual possession or control of a child shall be presumed to have the care of the child.

24. Nothing in this Act shall be construed to take away or affect the right of any parent, teacher, or other person having the lawful control or charge of a child to administer punishment to such child.

Right of
parent, &c., to
administer
punishment.
General defini-
tions—29 & 30
Vict. c. 118.

25. In this Act, unless the context otherwise requires—

The expression "local authority" means, as regards any borough in England, the council of the borough; as regards the city of London, the common council; as regards the county of London, the county council; and as regards any other place in England, the district council, and until a district council is established the urban or rural sanitary authority:

The expression "chief officer of police" means—

57 & 58 Vict.
c. 41.

*Prevention of
Cruelty to
Children Act,
1894.*

in the city of London and the liberties thereof, the commissioner of city police ;
in the metropolitan police district, the commissioner of police of the metropolis ;
elsewhere in England, the chief constable, or head constable or other officer, by whatever name called, having the chief local command of the police in the police district in reference to which such expression occurs :

The expression "street" includes any highway or other public place, whether a thoroughfare or not ;

The expression "place of safety" includes any place certified by the local authority under this Act for the purposes of this Act, and also includes any workhouse or police station, or any hospital surgery, or place of the like kind :

The expression "Industrial Schools Acts" means as regards England and Scotland the Industrial Schools Act, 1866, and the Acts amending the same.

Application of
Act to Scot-
land.

26. In the application of this Act to Scotland, unless the context otherwise requires—

The Secretary for Scotland shall be substituted for a Secretary of State :
The expression "local authority" means as regards any burgh in Scotland, being either a royal burgh or a burgh returning or contributing to return a member to Parliament, the town council ; as regards any police burgh in Scotland, the Commissioners of Police thereof, and as regards any county in Scotland exclusive of any burgh, the county council :

The expression "chief officer of police" means the chief constable, or head constable, superintendent or inspector, or other officer, by whatever name called, having the chief local command of the police in the police district in reference to which such expression occurs :

The expression "court of summary jurisdiction," the expression "petty sessional court," and the expression "justice of the peace" mean the sheriff or sheriff substitute :

The expression "misdemeanour" means crime and offence :

The expression "manslaughter" means culpable homicide :

The expression "defendant" includes panel, respondent, or person charged :

The expression "enter into a recognisance with or without sureties" means grant a bond of caution ;

The expression "workhouse" means poor house.

Application of
Act to Ireland
—41 & 42
Vict. c. 52—
81 & 82 Vict.
c. 25.

27. In the application of this Act to Ireland, unless the context otherwise requires—

The Chief Secretary shall be substituted for a Secretary of State :

The expression "local authority" means the sanitary authority within the meaning of the Public Health (Ireland) Act, 1878 :

The expression "chief officer of police" means in the police district of Dublin metropolis the chief commissioner of police for the said district ; and in any other police district the county inspector of the Royal Irish Constabulary :

The expression "committed for trial" means committed to prison or admitted to bail in manner provided in the Summary Jurisdiction (Ireland) Acts :

The expression "petty sessional court" means a court of summary jurisdiction :

The expression "Industrial Schools Act" means the Industrial Schools Act (Ireland), 1868, and any Act amending the same.

28. (1.) This Act may be cited as "The Prevention of Cruelty to Children Act, 1894."

(2.) The Prevention of Cruelty to, and Protection of, Children Act, 1889, and the Prevention of Cruelty to Children (Amendment) Act, 1894, are hereby repealed.

(3.) This Act shall come into operation on the twenty-first day of August one thousand eight hundred and ninety-four.

Prevention of Cruelty to Children Act, 1894.

Short title and repeal—
52 & 53 Vict.
c. 44—57 & 58
Vict. c. 27.

SCHEDULE.

Any offence under sections twenty-seven, fifty-five, or fifty-six of the Offences against the Person Act, 1861, and any offence against a child under the age of sixteen years under sections forty-three or fifty-two of that Act.

Any offence under the Children's Dangerous Performances Act, 1879.

Any other offence involving bodily injury to a child under the age of sixteen years.

24 & 25 Vict.
c. 100—
42 & 43 Vict.
c. 34.

UNIFORMS ACT, 1894.

57 & 58 VICT. CAP. 45.

An Act to regulate and restrict the wearing of Naval and Military Uniforms.—[25th August, 1894.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as "The Uniforms Act, 1894."

2. (1.) It shall not be lawful for any person not serving in Her Majesty's Military Forces to wear without Her Majesty's permission the uniform of any of those forces, or any dress having the appearance or bearing any of the regimental or other distinctive marks of any such uniform: Provided that this enactment shall not prevent—

Military uniforms not to be worn without authority.

(a.) A member of a band from wearing at or for the purpose of a public performance by the band at any time within six years after the passing of this Act any dress which, at the passing of this Act, is the recognised uniform of the band, unless the dress is an exact imitation of the uniform of any of Her Majesty's military forces; or

(b.) Any persons from wearing any uniform or dress in the course of a stage play performed in a place duly licensed or authorised for the public performance of stage plays, or in the course of a music hall or circus performance, or in the course of any *bond fide* military representation.

(2.) If any person contravenes this section he shall be liable on summary conviction to a fine not exceeding five pounds.

3. If any person not serving in Her Majesty's Naval or Military Forces wears without Her Majesty's permission the uniform of any of those forces, or any dress having the appearance or bearing any of the regimental or other distinctive marks of any such uniform in such a manner or under

Penalty for bringing on contempt on uniform

57 & 58 Vict. c. 45.	such circumstances as to be likely to bring contempt upon that uniform, or employs any other person so to wear that uniform or dress, he shall be
<i>Uniforms Act</i> , 1894.	liable on summary conviction to a fine not exceeding ten pounds, or to imprisonment for a term not exceeding one month.
Interpreta- tion.	4. In this Act— The expression “Her Majesty’s Military Forces” means the regular forces, the reserve forces, and the auxiliary forces within the meaning of the Army Act, other than the naval coast volunteers and naval volunteers: The expression “Her Majesty’s Naval Forces” means the Navy, the naval coast volunteers, and the naval volunteers.
Commence- ment.	5. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-five.

CHIMNEY SWEEPERS ACT, 1894.

57 & 58 VICT. CAP. 51.

An Act to make better provision for the Regulation of Chimney Sweepers.—
[25th August, 1894.]

Be it enacted by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Penalty for
knocking or
ringing bells.

1. Any person who shall for the purpose of soliciting employment as a chimney sweeper knock at the houses from door to door, or ring a bell, or use any noisy instrument, or to the annoyance of any inhabitant thereof ring the door-bell of any house, or cause anyone to do any of the acts aforesaid, shall be liable on summary conviction to a penalty not exceeding twenty shillings for every subsequent offence.

Application of
fees—38 & 39
Vict. c. 70.

2. All fees received under the Chimney Sweepers Act, 1875, in England shall be paid to the pension fund of the police force of the police district in which the certificate under the said Act was issued.

Short title and
construction.

3. This Act may be cited as “The Chimney Sweepers Act, 1894,” and shall be read as one with the Chimney Sweepers Act, 1875.

Extent of Act.

4. This Act shall not apply to Scotland.

Commence-
ment of Act.

5. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-five.

COAL MINES (CHECK WEIGHER) ACT, 1894.

57 & 58 VICT. CAP. 52.

An Act to amend the Provisions of the Coal Mines Regulation Act, 1887, with respect to Check Weighers.—[25th August, 1894.]

Be it enacted by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. If the owner, agent, or manager of any mine, or any person employed by or acting under the instructions of any such owner, agent, or manager, interferes with the appointment of a check weigher, or refuses to afford proper facilities for the holding of any meeting for the purpose of making such appointment, in any case in which the persons entitled to make the appointment do not possess or are unable to obtain a suitable meeting place, or attempts, whether by threats, bribes, promises, notice of dismissal, or otherwise howsoever, to exercise improper influence in respect of such appointment, or to induce the persons entitled to appoint a check weigher, or any of them, not to re-appoint a check weigher, or to vote for or against any particular person or class of persons in the appointment of a check weigher, such owner, agent, or manager shall be guilty of an offence against the Coal Mines Regulation Act, 1887.

57 & 58 Vict.
c. 52.

Coal Mines
(Check
Weigher) Act,
1894.

Penalty for
interference
with office of
check weigher
—50 & 51
Vict. c. 58.

2. This Act may be cited as "The Coal Mines (Check Weigher) Act, Short title, 1894."

MERCHANT SHIPPING ACT, 1894.

57 & 58 VICT. CAP. 60.

An Act to consolidate Enactments relating to Merchant Shipping.—
[25th August, 1894.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Forgery and False Declarations.

66. If any person forges, or fraudulently alters, or assists in forging or fraudulently altering, or procures to be forged or fraudulently altered, any of the following documents, namely, any register book, builder's certificate, surveyor's certificate, certificate of registry, declaration, bill of sale, instrument of mortgage, or certificate of mortgage or sale under this Part of this Act, or any entry or indorsement required by this Part of this Act to be made in or on any of those documents, that person shall in respect of each offence be guilty of felony.

Forgery of
documents.

67. (1.) If any person in the case of any declaration made in the presence of or produced to a registrar under this Part of this Act, or in any document or other evidence produced to such registrar—

False declara-
tions.

- (i.) wilfully makes, or assists in making, or procures to be made any false statement concerning the title to or ownership of, or the interest existing in any ship, or any share in a ship; or
- (ii.) utters, produces, or makes use of any declaration, or document containing any such false statement knowing the same to be false, he shall in respect of each offence be guilty of a misdemeanour.

(2.) If any person wilfully makes a false declaration touching the qualification of himself or of any other person or of any corporation to own a British ship or any share therein, he shall for each offence be guilty of a misdemeanour, and that ship or share shall be subject to forfeiture under this Act, to the extent of the interest therein of the declarant, and also, unless it is proved that the declaration was made without authority, of any person or corporation on behalf of whom the declaration is made.

57 & 58 V. T.
c. 60.

*Merchant
Shipping Act,
1894.*

Forgery, &c.,
of certificate
of competency.

Forgery, &c.,
of agreements
with crew.

False or forged
certificate of
discharge or
report of
character.

Penalty for
issuing money
orders with
fraudulent
intent.

Forgery of
documents,
&c., for pur-
pose of obtain-
ing money in
seamen's
savings bank.

104. If any person—

- (a.) forges or fraudulently alters, or assists in forging or fraudulently altering, or procures to be forged or fraudulently altered, any certificate of competency, or any official copy of any such certificate ; or
- (b.) makes, assists in making, or procures to be made, any false representation for the purpose of procuring either for himself or for any other person a certificate of competency ; or
- (c.) fraudulently uses a certificate or copy of a certificate of competency which has been forged, altered, cancelled or suspended, or to which he is not entitled ; or
- (d.) fraudulently lends his certificate of competency or allows it to be used by any other person,

that person shall in respect of each offence be guilty of a misdemeanour.

121. If any person fraudulently alters, makes any false entry in, or delivers a false copy of, any agreement with the crew, that person shall in respect of each offence be guilty of a misdemeanour, and if any person assist in committing or procures to be committed any such offence he shall likewise in respect of each offence be guilty of a misdemeanour.

130. If any person—

- (a.) makes a false report of character under this Act, knowing the same to be false ; or
- (b.) forges or fraudulently alters any certificate of discharge or report of character or copy of a report of character ; or
- (c.) assists in committing, or procures to be committed, any of such offences as aforesaid ; or
- (d.) fraudulently uses any certificate of discharge or report of character or copy of a report of character which is forged or altered or does not belong to him,

he shall in respect of each offence be guilty of a misdemeanour.

147. If any superintendent or officer grants or issues a seaman's money order with a fraudulent intent he shall be guilty of felony, and shall for each offence be liable to penal servitude for a term not exceeding five and not less than three years.

154. If any person, for the purpose of obtaining, either for himself or for any other person, any money deposited in a seamen's savings bank or any interest thereon—

- (a.) forges or fraudulently alters, assists in forging or fraudulently altering, or procures to be forged or fraudulently altered, any document purporting to show or assist in showing any right to any such money or interest ; or
- (b.) makes use of any document which has been so forged or fraudulently altered as aforesaid ; or
- (c.) gives, assists in giving, or procures to be given, any false evidence, knowing the same to be false ; or
- (d.) makes, assists in making, or procures to be made, any false representation, knowing the same to be false ; or
- (e.) assists in procuring any false evidence or representation to be given or made, knowing the same to be false ;

that person shall for each offence be liable to penal servitude for a term not exceeding five years, or to imprisonment for any term not exceeding two years with or without hard labour, or on summary conviction to imprisonment with or without hard labour for any period not exceeding six months.

180. If any person, for the purpose of obtaining, either for himself or for any other person, any property of any deceased seaman or apprentice to the sea service,—

- (a.) forges or fraudulently alters, or assists in forging or fraudulently altering, or procures to be forged or fraudulently altered, any document purporting to show or assist in showing any right to such property; or
- (b.) makes use of any document which has been so forged or fraudulently altered as aforesaid; or
- (c.) gives or assists in giving, or procures to be given, any false evidence, knowing the same to be false; or
- (d.) makes or assists in making, or procures to be made, any false representation, knowing the same to be false; or
- (e.) assists in procuring any false evidence or representation to be given or made, knowing the same to be false,—

that person shall for each offence be liable to penal servitude for a term not exceeding five years, or to imprisonment for a term not exceeding two years with or without hard labour, or on summary conviction to imprisonment with or without hard labour for any period not exceeding six months.

187. The master of, or any other person belonging to, a British ship, shall not wrongfully force on shore and leave behind, or otherwise wilfully and wrongfully leave behind, in any place on shore or at sea, in or out of Her Majesty's dominions, a seaman or apprentice to the sea service before the completion of the voyage for which he was engaged or before the return of the ship to the United Kingdom, and if he does so, he shall in respect of each offence be guilty of a misdemeanour.

188. (1.) The master of a British ship shall not discharge a seaman or apprentice to the sea service abroad, or leave him behind abroad, ashore, or at sea, unless he previously obtains, indorsed on the agreement with the crew, the sanction, or in the case of leaving behind the certificate—

- (a.) at any place in a British possession of a superintendent (or in the absence of any such superintendent of the chief officer of customs at or near the place); and
- (b.) at any place elsewhere of the British consular officer for the place, or, in the absence of any such officer, of two merchants resident at or near the place, or, if there is only one merchant so resident, of that merchant;

but nothing in this section shall require such sanction where the discharge is in the British possession where the seaman was shipped.

(2.) The certificate shall state in writing the fact and cause of the seaman being left behind, whether the cause be unfitness or inability to proceed to sea, desertion, or disappearance.

(3.) The person to whom an application is made for a sanction or certificate under this section may, and, if not a merchant, shall, examine into the grounds on which a seaman or apprentice is to be discharged or left abroad, and for that purpose may, if he thinks fit, administer oaths, and may grant or refuse the sanction or certificate as he thinks just.

(4.) If a master acts in contravention of this section he shall be guilty of a misdemeanour, and in any legal proceeding for the offence it shall lie on the master to prove that the sanction or certificate was obtained, or could not be obtained.

197. (1.) Where the wages of a seaman received into Her Majesty's naval service are paid in money, the money shall be credited in the ship's ledger to the account of the seaman.

Merchant Shipping Act, 1894.

Forgery of documents, &c., for purpose of obtaining property of deceased seamen.

Penalty for forcing seamen on shore or leaving them behind.

Seamen not to be discharged or left abroad unless sanction or certificate obtained.

Wages of seamen received into navy.

57 & 58 Vict.
c. 60.

*Merchant
Shipping Act,
1894.*

(2.) Where the wages are paid by bill, the bill shall be noted in the ship's ledger, and sent to the Accountant-General of the Navy, who shall cause the same to be presented for payment, and shall credit the produce thereof to the account of the seaman.

(3.) An officer who receives any such bill shall not be subject to any liability in respect thereof, except for the safe custody thereof until sent to the Accountant-General as aforesaid.

(4.) The wages of the seaman shall not be paid to him until the time at which he would have been entitled to receive the same if he had remained in the service of the ship which he has quitted for the purpose of entering Her Majesty's service.

(5.) If the owner or master of the ship shows to the satisfaction of the Admiralty that he has paid or properly rendered himself liable to pay, an advance of wages to or on account of the seaman, and has satisfied that liability, and that the seaman has not at the time of quitting his ship duly earned the advance by service therein, the Admiralty may pay to the owner or master so much of the advance as had not been duly earned, and deduct the sum so paid from any wages of the seaman earned or to be earned in the naval service of Her Majesty.

(6.) Where, in consequence of a seaman so leaving his ship and entering Her Majesty's service, it becomes necessary for the safety and proper navigation of the ship to engage any substitute, and the wages or other remuneration paid to the substitute for subsequent service exceed the wages or remuneration which would have been payable to the seaman under his agreement for similar service, the master or owner of the ship may apply to the High Court for a certificate authorising the repayment of the excess, and the application shall be made and the certificate granted in accordance with rules of court.

(7.) The certificate shall be sent to the applicant or his solicitor or agent, and a copy thereof shall be sent to the Accountant-General of the Navy; and the Accountant-General shall, upon delivery to him of the original certificate together with a receipt in writing purporting to be a receipt from the applicant, pay to the person delivering the certificate, out of the moneys granted by Parliament for Navy services, the amount mentioned in the certificate; and the certificate and receipt shall absolutely discharge the Accountant-General and Her Majesty from all liability in respect of the moneys so paid or of the application thereof.

(8.) If any person in making or supporting any application under this section—

- (a.) forges or fraudulently alters, or assists in forging or fraudulently altering, or procures to be forged or fraudulently altered, any document; or
 - (b.) presents or makes use of any document so forged or fraudulently altered; or
 - (c.) gives, assists in giving, or procures to be given, any false evidence, knowing the same to be false; or
 - (d.) makes, assists in making, or procures to be made, any false representation, knowing the same to be false,
- that person shall in respect of each offence be guilty of a misdemeanour.

Penalty for
being on board
ship without
permission
before seamen
leave.

218. Where a ship is about to arrive, is arriving, or has arrived at the end of her voyage, and any person, not being in Her Majesty's service or not being duly authorised by law for the purpose—

- (a.) goes on board the ship, without the permission of the master,

- before the seamen lawfully leave the ship at the end of their 57 & 58 VICT. engagement, or are discharged (whichever last happens); or, c. 60.
- (b.) being on board the ship, remains there after being warned to leave by the master, or by a police officer, or by any officer of the Board of Trade or of the Customs, *Merchant Shipping Act, 1894.*

that person shall for each offence be liable to a fine not exceeding twenty pounds, or, at the discretion of the court, to imprisonment for any term not exceeding six months; and the master of the ship or any officer of the Board of Trade may take him into custody, and deliver him up forthwith to a constable to be taken before a court capable of taking cognisance of the offence.

Provisions as to Discipline.

220. If a master, seaman, or apprentice belonging to a British ship by wilful breach of duty or by neglect of duty or by reason of drunkenness,— *Misconduct endangering life or ship.*

- (a) does any act tending to the immediate loss, destruction, or serious damage of the ship, or tending immediately to endanger the life or limb of a person belonging to or on board the ship; or,
- (b) refuses or omits to do any lawful act proper and requisite to be done by him for preserving the ship from immediate loss, destruction, or serious damage, or for preserving any person belonging to or on board the ship from immediate danger to life or limb,

he shall in respect of each offence be guilty of a misdemeanour.

221. If a seaman lawfully engaged, or an apprentice to the sea service, commits any of the following offences he shall be liable to be punished summarily as follows:— *Desertion and absence without leave.*

- (a.) If he deserts from his ship he shall be guilty of the offence of desertion and be liable to forfeit all or any part of the effects he leaves on board, and of the wages which he has then earned, and also, if the desertion takes place abroad, of the wages he may earn in any other ship in which he may be employed until his next return to the United Kingdom, and to satisfy any excess of wages paid by the master or owner of the ship to any substitute engaged in his place at a higher rate of wages than the rate stipulated to be paid to him; and also, except in the United Kingdom, he shall be liable to imprisonment for any period not exceeding twelve weeks with or without hard labour;
- (b.) If he neglects, or refuses without reasonable cause, to join his ship, or to proceed to sea in his ship, or is absent without leave at any time within twenty-four hours of the ship's sailing from a port, either at the commencement or during the progress of a voyage, or is absent at any time without leave and without sufficient reason from his ship or from his duty, he shall, if the offence does not amount to desertion, or is not treated as such by the master, be guilty of the offence of absence without leave, and be liable to forfeit out of his wages a sum not exceeding two days pay, and in addition for every twenty-four hours of absence, either a sum not exceeding six days pay, or any expenses properly incurred in hiring a substitute; and also, except in the United Kingdom, he shall be liable to imprisonment for any period not exceeding ten weeks with or without hard labour.

57 & 58 Vict.
c. 60.

Merchant
Shipping Act.
1894.

Conveyance of
deserter on
board ship.

Provisions as
to arrest and
imprisonment
applying out
of the United
Kingdom.

Power of court
to order
offender to be
taken on board

222. (1.) If in the United Kingdom a seaman or apprentice is guilty of the offence of desertion or of absence without leave, or otherwise absents himself from his ship without leave, the master, any mate, the owner, ship's husband, or consignee of the ship, may, with or without the assistance of the local police officers or constables, convey him on board his ship, and those officers and constables are hereby directed to give assistance if required.

(2.) Provided that if the seaman or apprentice so requires he shall first be taken before some court capable of taking cognisance of the matter to be dealt with according to law.

(3.) If it appears to the court before whom the case is brought that the seaman or apprentice has been conveyed on board or taken before the court on improper or insufficient grounds, that court may inflict on the master, mate, owner, ship's husband, or consignee, as the case may be, a fine not exceeding twenty pounds; but the infliction of that fine shall be a bar to any action for false imprisonment in respect of the arrest.

223. (1.) If out of the United Kingdom, either at the commencement or during the progress of any voyage, a seaman or apprentice is guilty of the offence of desertion or of absence without leave, or otherwise absents himself from his ship without leave, the master, any mate, the owner, ship's husband, or consignee, may in any place in Her Majesty's dominions out of the United Kingdom, with or without the assistance of the local police officers or constables (and those officers and constables are hereby directed to give assistance if required) and also at any place out of Her Majesty's dominions, if and so far as the laws in force at that place will permit, arrest him without first procuring a warrant.

(2.) A person so arresting a seaman or apprentice may in any case, and shall in case the seaman or apprentice so requires and it is practicable, convey him before some court capable of taking cognisance of the matter, to be dealt with according to law, and for that purpose may detain him in custody for a period not exceeding twenty-four hours, or such shorter time as may be necessary; but if the seaman or apprentice does not require to be so taken before a court, or if there is no such court at or near the place, the person arresting him may at once convey him on board his ship.

(3.) If it appears to the court before whom the case is brought that an arrest under this section has been made on improper or on insufficient grounds, the master, mate, owner, ship's husband, or consignee who made the arrest, or caused it to be made, shall be liable to a fine not exceeding twenty pounds; but the infliction of that fine shall be a bar to any action for false imprisonment in respect of the arrest.

(4.) If out of the United Kingdom a seaman or apprentice is imprisoned for having been guilty of the offence of desertion or of absence without leave, or for having committed any other breach of discipline, and during his imprisonment and before his engagement is at an end, his services are required on board his ship, a justice of the peace may, on the application of the master or of the owner or his agent, notwithstanding that the period of imprisonment is not at an end, cause the seaman or apprentice to be conveyed on board his ship for the purpose of proceeding on the voyage, or to be delivered to the master or any mate of the ship, or to the owner or his agent, to be by them so conveyed.

224. (1.) Where a seaman or apprentice is brought before a court on the ground of the offence of desertion, or of absence without leave, or of otherwise absenting himself without leave, the court, if the master or the

owner or his agent so require, may (and if out of the United Kingdom in 57 & 58 Vict. a. 60. lieu of committing him to prison) cause him to be conveyed on board his ship for the purpose of proceeding on the voyage or deliver him to the master, or any mate of the ship, or the owner, or his agent, to be by them so conveyed, and may in such case order any costs and expenses properly incurred by or on behalf of the master or owner by reason of the offence to be paid by the offender, and, if necessary, to be deducted from any wages which he has then earned, or by virtue of his then existing engagement may afterwards earn.

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Merchant
Shipping Act,
1894.
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(2.) If in the United Kingdom a seaman or apprentice to the sea service intends to absent himself from his ship or his duty, he may give notice of his intention, either to the owner or to the master of the ship, not less than forty-eight hours before the time at which he ought to be on board his ship; and in the event of that notice being given, the court shall not exercise any of the powers conferred by this section for causing the offender to be conveyed on board his ship.

225. (1.) If a seaman lawfully engaged or an apprentice to the sea service commits any of the following offences, in this Act referred to as offences against discipline, he shall be liable to be punished summarily as follows; that is to say, General offences against discipline.

- (a.) If he quits the ship without leave after her arrival at her port of delivery, and before she is placed in security, he shall be liable to forfeit out of his wages a sum not exceeding one month's pay :
 - (b.) If he is guilty of wilful disobedience to any lawful command, he shall be liable to imprisonment for a period not exceeding four weeks, and also, at the discretion of the court, to forfeit out of his wages a sum not exceeding two days pay :
 - (c.) If he is guilty of continued wilful disobedience to lawful commands or continued wilful neglect of duty, he shall be liable to imprisonment for a period not exceeding twelve weeks, and also, at the discretion of the court, to forfeit for every twenty-four hours continuance of disobedience or neglect, either a sum not exceeding six days pay, or any expenses properly incurred in hiring a substitute :
 - (d.) If he assaults the master or any mate or certified engineer of the ship, he shall be liable to imprisonment for a period not exceeding twelve weeks :
 - (e.) If he combines with any of the crew to disobey lawful commands, or to neglect duty, or to impede the navigation of the ship or the progress of the voyage, he shall be liable to imprisonment for a period not exceeding twelve weeks :
 - (f.) If he wilfully damages his ship, or embezzles or wilfully damages any of her stores or cargo, he shall be liable to forfeit out of his wages a sum equal to the loss thereby sustained, and also, at the discretion of the court, to imprisonment for a period not exceeding twelve weeks :
 - (g.) If he is convicted of any act of smuggling, whereby loss or damage is occasioned to the master or owner of the ship, he shall be liable to pay to that master or owner a sum sufficient to reimburse the loss or damage; and the whole or a proportionate part of his wages may be retained in satisfaction or on account of that liability, without prejudice to any further remedy.
- (2.) Any imprisonment under this section may be with or without hard labour.

57 & 58 Vict.
c. 60.

*Merchant
Shipping Act,*
1894.

Entries re-
quired in
official log
book.

Offences in
respect of
official logs.

Embezzlement
by officers of
local marine
boards—
24 & 25 Vict.
c. 96.

240. The master of a ship for which an official log is required shall enter or cause to be entered in the official log book the following matters: (that is to say,)

- (1.) Every conviction by a legal tribunal of a member of his crew, and the punishment inflicted:
- (2.) Every offence committed by a member of his crew for which it is intended to prosecute, or to enforce a forfeiture, or to exact a fine, together with such statement concerning the copy or reading over of that entry, and concerning the reply (if any) made to the charge, as is by this Act required:
- (3.) Every offence for which punishment is inflicted on board, and the punishment inflicted:
- (4.) A statement of the conduct, character, and qualifications of each of his crew, or a statement that he declines to give an opinion on those particulars:
- (5.) Every case of illness or injury happening to a member of the crew, with the nature thereof, and the medical treatment adopted (if any):
- (6.) Every marriage taking place on board, with the names and ages of the parties:
- (7.) The name of every seaman or apprentice who ceases to be a member of the crew, otherwise than by death, with the place, time, manner, and cause thereof:
- (8.) The wages due to any seaman who enters Her Majesty's naval service during the voyage:
- (9.) The wages due to any seaman or apprentice who dies during the voyage, and the gross amount of all deductions to be made therefrom:
- (10.) The sale of the effects of any seaman or apprentice who dies during the voyage, including a statement of each article sold, and the sum received for it:
- (11.) Every collision with any other ship, and the circumstances under which the same occurred: and
- (12.) any other matter directed by this Act to be entered.

241. (1.) If an official log book is not kept in the manner required by this Act, or if an entry directed by this Act to be made therein is not made at the time and in the manner directed by this Act, the master shall for each offence be liable to the specific fine in this Act mentioned in respect thereof, or where there is no such specific fine, to a fine not exceeding five pounds.

(2.) If any person makes or procures to be made, or assists in making, any entry in an official log book in respect of any occurrence happening previously to the arrival of the ship at her final port of discharge more than twenty-four hours after that arrival, he shall for each offence be liable to a fine not exceeding thirty pounds.

(3.) If any person wilfully destroys or mutilates or renders illegible any entry in an official log book, or wilfully makes or procures to be made or assists in making a false or fraudulent entry in or omission from an official log book, he shall in respect of each offence be guilty of a misdemeanour.

248. (1.) A person appointed to any office or service by or under a local marine board shall be deemed to be a clerk or servant within the meaning of section 68 of the Larceny Act, 1861 (relating to embezzlement).

(2.) If any person so appointed to an office or service—

- (a) fraudulently applies or disposes of any chattel, money, or valuable security received by him (whilst employed in such office or service) for or on account of any local marine board, or for or on account of any other public board or department, for his own use, or any use or purpose other than that for which the same was paid, entrusted to, or received by him, or
- (b) fraudulently withholds, retains or keeps back the same, or any part thereof, contrary to any lawful directions or instructions which he is required to obey in relation to his office or service aforesaid, that person shall be guilty of embezzlement within the meaning of the said section 68 of the Larceny Act, 1861.

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(3.) In any indictment under this section, it shall be sufficient to charge any such chattel, money, or valuable security as the property either of the local marine board by whom the person was appointed, or of the board or department for or on account of whom the same was received.

(4.) Section 71 of the Larceny Act, 1861 (relating to the manner of charging embezzlement), shall apply as if an offence under this section were embezzlement under that Act.

282. If any person—

- (a) knowingly and wilfully makes, or assists in making, or procures to be made, a false or fraudulent declaration of survey or passenger steamer's certificate; or
- (b) forges, assists in forging, procures to be forged, fraudulently alters, assists in fraudulently altering, or procures to be fraudulently altered, any such declaration or certificate, or anything contained in, or any signature to any such declaration or certificate, that person shall in respect of each offence be guilty of a misdemeanour.

Penalty for
forgery of
certificate or
declaration.

Keeping Order in Passenger Steamers.

287. (1.) If any of the following offences is committed in the case of a passenger steamer for which there is a passenger steamer's certificate in force; that is to say,

Offences in
connection
with passenger
steamers

- (a.) If any person being drunk or disorderly has been on that account refused admission thereto by the owner or any person in his employment, and, after having the amount of his fare (if he has paid it) returned or tendered to him, nevertheless persists in attempting to enter the steamer:
- (b.) If any person being drunk or disorderly on board the steamer is requested by the owner or any person in his employ to leave the steamer at any place in the United Kingdom, at which he can conveniently do so, and, after having the amount of his fare (if he has paid it) returned or tendered to him, does not comply with his request:
- (c.) If any person on board the steamer, after warning by the master or other officer thereof, molests or continues to molest any passenger:
- (d.) If any person, after having been refused admission to the steamer by the owner or any person in his employ on account of the steamer being full, and having had the amount of his fare (if he has paid it) returned or tendered to him, nevertheless persists in attempting to enter the steamer:
- (e.) If any person having gone on board the steamer at any place, and

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being requested, on account of the steamer being full, by the owner or any person in his employ to leave the steamer, before it has quitted that place, and having had the amount of his fare (if he has paid it) returned or tendered to him, does not comply with that request :

- (f.) If any person travels or attempts to travel in the steamer without first paying his fare, and with intent to avoid payment thereof :
- (g.) If any person, having paid his fare for a certain distance, knowingly and wilfully proceeds in the steamer beyond that distance without first paying the additional fare for the additional distance, and with intent to avoid payment thereof :
- (h.) If any person on arriving in the steamer at a point to which he has paid his fare knowingly and wilfully refuses or neglects to quit the steamer : and
- (i.) If any person on board the steamer fails, when requested by the master or other officer thereof, either to pay his fare or exhibit such ticket or other receipt, if any, showing the payment of his fare, as is usually given to persons travelling by and paying their fare for the steamer :

the person so offending shall for each offence be liable to a fine not exceeding forty shillings, but that liability shall not prejudice the recovery of any fare payable by him.

(2.) If any person on board any such steamer wilfully does or causes to be done anything in such a manner as to obstruct or injure any part of the machinery or tackle of the steamer, or to obstruct, impede, or molest the crew, or any of them, in the navigation or management of the steamer, or otherwise in the execution of their duty on or about the steamer, he shall for each offence be liable to a fine not exceeding twenty pounds.

(3.) The master or other officer of any such steamer, and all persons called by him to his assistance, may, without any warrant, detain any person who commits any offence against this section and whose name and address are unknown to the master or officer, and convey the offender with all convenient despatch before some justice of the peace to be dealt with according to law, and that justice shall with all convenient despatch try the case in a summary manner.

(4.) If any person commits an offence against this section and on the application of the master of the steamer, or any other person in the employ of the owner thereof, refuses to give his name and address, or gives a false name or address, that person shall be liable to a fine not exceeding twenty pounds, and the fine shall be paid to the owner of the steamer.

Attempt to
gain passage
without pay-
ment.

313. (1.) If a person is found on board an emigrant ship with intent to obtain a passage therein without the consent of the owner, charterer, or master thereof, he and any person aiding or abetting him shall be liable to a fine not exceeding twenty pounds, and in default of payment to imprisonment for a period not exceeding three months, with or without hard labour.

(2.) Any person so found on board may, without warrant, be taken before a justice of the peace to be dealt with according to law, and that justice may try the case in a summary manner.

Discipline on
board.

325. (1.) In every emigrant ship the medical practitioner aided by the master or, in the absence of the medical practitioner, the master, shall

exact obedience to all regulations made by any such Order in Council as 57 & 58 Vic
aforesaid. a. 60.

(2.) If any person on board—

(a.) fails without reasonable cause to obey, or offends against, any such regulation or any provision of this Part of this Act, or *Merchant Shipping Act 1894.*

(b.) obstructs the master or medical practitioner in the execution of any duty imposed upon him by any such regulation, or

(c.) is guilty of riotous or insubordinate conduct,
that person shall for each offence be liable to a fine not exceeding two pounds, and in addition to imprisonment for any period not exceeding one month.

Provisions in case of Wreck.

331. (1.) When any emigrant ship—

(a.) has, while in any port of the British Islands, or after the commencement of the voyage, been wrecked or otherwise rendered unfit to proceed on her intended voyage, and any intended steerage passengers have been brought back to any port in the British Islands; or *Provision in case of an emigrant ship being wrecked or damaged in or near British Islands.*

(b.) has put into any port in the British Islands in a damaged state; the master, charterer, or owner of that ship shall, within forty-eight hours thereafter, give to the nearest emigration officer a written undertaking to the following effect; that is to say,

(i.) if the ship has been wrecked or rendered unfit to proceed on her voyage, that the owner, charterer, or master thereof will embark and convey the steerage passengers in some other eligible ship, to sail within six weeks from the date of the undertaking, to the port for which their passage had been taken:

(ii.) if the ship has put into port in a damaged state, that she will be made seaworthy and fit in all respects for her intended voyage, and will within six weeks from the date of the undertaking sail again with the steerage passengers.

(2.) In either of the above cases, the owner, charterer, or master shall, until the steerage passengers proceed on their voyage, either lodge and maintain them on board in the same manner as if they were at sea, or pay either to the steerage passengers, or (if they are lodged and maintained in any hulk or establishment under the superintendence of the Board of Trade) to the emigration officer at the port, subsistence money at the rate of one shilling and sixpence a day for each statute adult.

(3.) If the substituted ship, or the damaged ship, as the case may be, does not sail within the above-mentioned time, or if default is made in compliance with any requirement of this section, any steerage passenger or any emigration officer on his behalf may recover summarily all money paid by or on account of the passenger for the passage from the person to whom or on whose account the same was paid, or from the owner, charterer, or master of the ship, at the option of the passenger or emigration officer.

(4.) The emigration officer may, if he thinks it necessary, direct that the steerage passengers be removed from any damaged emigrant ship at the expense of the master thereof, and if after that direction any steerage passenger refuses to leave the ship, he shall for each offence be liable to a fine not exceeding forty shillings, or to imprisonment not exceeding one month.

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Frauds in pro-
curing pas-
sages.

Penalties for
fraud in con-
nection with
assisting
emigration.

Frauds in procuring Emigration.

353. If any person by any false representation, fraud, or false pretence induces any person to engage a steerage passage in any ship, he shall for each offence be liable to a fine not exceeding twenty pounds.

354. If any person—

- (a) falsely represents himself to be, or falsely assumes to act as, agent of the Board of Trade in assisting persons who desire to emigrate; or
- (b) sells any form of application, embarkation order, or other document or paper issued by the Board of Trade or by a Secretary of State for the purpose of assisting persons who desire to emigrate; or
- (c) makes any false representation in any such application for assistance to the Board of Trade or a Secretary of State, or in any certificate of marriage, birth, or baptism, or other document or statement adduced in support of any such application; or
- (d) forges or fraudulently alters any signature or statement in any such application, certificate, document, or statement, or personates any person named therein; or
- (e) aids or abets any person in committing any of the foregoing offences;

that person shall, for each offence, be liable to a fine not exceeding fifty pounds.

Discipline.

Offences by
seamen and
apprentices.

376. (1.) If a seaman lawfully engaged to serve in any fishing boat, or an apprentice in the sea fishing service, commits any of the following offences, that seaman or apprentice shall be liable to be punished summarily as follows :—

- (a.) For the offence of desertion,—he shall be liable to forfeit all or any part of the effects he leaves on board, and all or any part of the wages which he has then earned, and to satisfy any excess of wages paid by the skipper or owner of the fishing boat from which he deserts to any substitute engaged in his place at a higher rate of wages than the rate stipulated to be paid to him:
- (b.) For the offence of absence without leave, that is to say for neglecting or refusing without reasonable cause to join or to proceed to sea in his fishing boat, or for being absent without leave at any time within twenty-four hours of his boat's sailing from any port, either at the commencement or during the progress of the engagement, or for being absent at any time without leave and without sufficient reason from his boat,—if the offence does not amount to desertion, or is not treated as such by the skipper, he shall be liable to forfeit a sum not exceeding two days wages, and in addition for every twenty-four hours of absence, either a sum not exceeding four days wages, or any expenses properly incurred in respect of a substitute :
- (c.) For the offence of wrongfully quitting the boat, that is to say for quitting the boat without leave after her arrival in port, and before she is placed in security,—he shall be liable to forfeit a sum not exceeding two weeks wages :
- (d.) For the offence of wilful disobedience, that is to say for wilfully disobeying any lawful command during the engagement,—he shall be liable to imprisonment for any period not exceeding four

weeks, and also to forfeit a sum not exceeding two days 57 & 58 Vict.
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- (e.) For the offence of continued breach of duty, that is to say, for continued wilful disobedience to lawful commands during the engagement, or continued wilful omission to do his duty during the engagement,—he shall be liable to imprisonment for any period not exceeding twelve weeks, and also to forfeit for every twenty-four hours continuance of the offence either a sum not exceeding six days wages or any expenses properly incurred in respect of a substitute :

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- (f.) For the offence of assault, that is to say, for assaulting any skipper or second hand,—he shall be liable to imprisonment for a period not exceeding twelve weeks :

- (g.) For the offence of unlawful combination, that is to say, for combining with any one or more of the crew to disobey lawful commands, or to neglect duty, or to impede the navigation of the boat, or the progress of the trip,—he shall be liable to imprisonment for a period not exceeding twelve weeks :

- (h.) For the offence of wilful damage, that is to say, for wilfully damaging the boat or embezzling or wilfully damaging any of her stores or cargo,—he shall be liable to forfeit a sum equal in amount to the loss thereby sustained, and also to imprisonment for a period not exceeding twelve weeks :

- (i.) For the offence of smuggling, that is to say, for any act of smuggling of which he is convicted and which caused loss or damage to the skipper or owner,—he shall be liable to forfeit a sum sufficient to reimburse that loss or damage.

- (2.) A skipper shall be liable to punishment for the said offences of desertion, absence without leave, wrongfully quitting the boat, wilful damage, and smuggling, as if he were a seaman.

(3.) The court before whom any skipper, seaman, or apprentice is convicted of an offence under this section may order any money forfeited for that offence to be deducted from his wages, and (if they think fit) may order the forfeiture to be applied for the benefit of the person by whom the wages are payable, or of the person injured by the commission of the offence.

(4.) The provisions of this section relating to the offences of wilful disobedience, continued breach of duty, assault, and unlawful combination shall extend to apprentices in the sea fishing service, and to sea fishing boys as hereinafter defined, whether on shore or on board.

(5.) A seaman or apprentice shall not be relieved by his refusal or neglect to go to sea or by his desertion from being liable to punishment under this section for an offence of wilful disobedience, continued breach of duty, or unlawful combination, and in addition to any such punishment shall also be liable to be punished for the offence of desertion or absence without leave.

(6.) Any imprisonment under this section may be with or without hard labour.

379. Whenever any seaman or apprentice is brought before any court charged with the offence (under this Part of this Act) of desertion or of absence without leave, or with otherwise absenting himself from his boat without leave, the court may at the request of the owner or skipper or his agent, in addition to, or in lieu of, imposing any punishment to which he may be liable, cause him to be conveyed on board for the purpose of

Deserters and
others may be
sent back to
their boats.

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Apprehension
of seamen
guilty of
certain
offences.

fulfilling his engagement, or deliver him to the skipper to be so conveyed by him, and may order any costs or expenses properly incurred to be paid by the offender, and if necessary to be deducted from any wages which he has then earned, or which he may thereafter earn under his engagement.

380. (1.) Any of the following officers, namely—

(a) a superintendent; or

(b) the principal Board of Trade officer at a port or district, or his deputy;

may, on the information (made, if the officer so require, on oath) of the owner, skipper, second hand, or agent of a fishing boat, issue a warrant under his hand in the form approved by the Board of Trade for the apprehension of any seaman or apprentice charged with the offence (under this part of this Act) of desertion, absence without leave, wilful disobedience, continued breach of duty, or unlawful combination.

(2.) Such warrant shall be executed by any constable of the county, borough, or place, where the offender may be, and shall continue in force for ninety-six hours from the time endorsed on the warrant by the officer issuing the same.

(3.) The seaman or apprentice when apprehended shall be brought by the constable without delay before some officer by whom a warrant may be issued under this section, and that officer shall then and there inquire into the case, and if the explanation of the seaman or apprentice is, in his opinion, sufficient, shall discharge him, but, if not, shall order him to join his boat and resume his duty.

(4.) If the seaman or apprentice refuses to obey that order, the officer shall order him to be detained and to be brought with convenient speed before a court of summary jurisdiction, and that court shall hear and determine in due course of law the charge made against him by the information on which he has been apprehended.

(5.) An information laid before an officer under this section need not be reduced to writing.

(6.) An officer acting under this section may take the evidence (if he thinks fit, on oath) of any person other than the seaman or apprentice charged who is able and willing to give information as to the matters in question, and for that purpose shall have the powers of a Board of Trade Inspector under this Act.

(7.) A warrant issued under this section shall be valid if it is in the form approved by the Board of Trade and filled in reasonably in accordance with the directions contained in the form, and is duly signed, and shall not be invalidated by the officer who issued it dying or ceasing to hold office.

Dealing with
seaman who
refuses to pro-
ceed to sea, &c.

381. If a seaman or apprentice engaged or liable to serve on board any fishing boat neglects, or refuses to join, or deserts from, or refuses to proceed to sea in, or absents himself without leave from that fishing boat, the skipper, owner, or agent of the boat may, with or without the assistance of the local constables (who shall give their assistance in these cases when required by the skipper, owner, or agent) take the seaman or apprentice before some officer by whom a warrant can be issued for his apprehension under this Part of this Act, who shall deal with him as if apprehended under such a warrant.

Prohibition on
taking money
for apprentice-
ships and boys
agreements.

398. If any person—

(a) receives any money or valuable consideration from the person to whom an apprentice in the sea-fishing service is bound, or to

whom a sea-fishing boy is bound by an agreement, or from any- 57 & 58 Vict.
one on that person's behalf, or from the apprentice or boy or any- c. 60.
one on the apprentice or boy's behalf, in consideration of the
apprentice or boy being so bound; or

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(b) makes or causes any such payment to be made;
that person shall in respect of each offence be guilty of a misdemeanour,
whether the apprentice or boy was or was not validly bound.

422. (1.) In every case of collision between two vessels, it shall be the Duty of vessel
duty of the master or person in charge of each vessel, if and so far as he to assist the
can do so without danger to his own vessel, crew and passengers (if any), other in case
of collision.

(a) to render to the other vessel, her master, crew and passengers (if
any) such assistance as may be practicable, and may be necessary
to save them from any danger caused by the collision, and to
stay by the other vessel until he has ascertained that she has no
need of further assistance, and also

(b) to give to the master or person in charge of the other vessel the
name of his own and of the port to which she belongs, and also
the names of the ports from which she comes and to which she
is bound.

(2.) If the master or person in charge of a vessel fails to comply with
this section, and no reasonable cause for such failure is shown, the colli-
sion shall, in the absence of proof to the contrary, be deemed to have
been caused by his wrongful act, neglect, or default.

(3.) If the master or person in charge fails without reasonable cause to
comply with this section, he shall be guilty of a misdemeanour, and, if he
is a certificated officer, an inquiry into his conduct may be held, and his
certificate cancelled or suspended.

Unseaworthy Ships.

457. (1.) If any person sends or attempts to send, or is party to sending Sending un-
or attempting to send, a British ship to sea in such an unseaworthy state seaworthy ship
that the life of any person is likely to be thereby endangered, he shall in to sea a mis-
respect of each offence be guilty of a misdemeanour, unless he proves demeanour.
either that he used all reasonable means to insure her being sent to sea in
a seaworthy state, or that her going to sea in such an unseaworthy state
was, under the circumstances, reasonable and justifiable, and for the
purpose of giving that proof he may give evidence in the same manner as
any other witness.

(2.) If the master of a British ship knowingly takes the same to sea in
such an unseaworthy state that the life of any person is likely to be
thereby endangered, he shall in respect of each offence be guilty of a mis-
demeanour, unless he proves that her going to sea in such an unseaworthy
state was, under the circumstances, reasonable and justifiable, and for the
purpose of giving such proof he may give evidence in the same manner as
any other witness.

(3.) A prosecution under this section shall not, except in Scotland, be
instituted otherwise than by, or with the consent of, the Board of Trade,
or of the governor of the British possession in which the prosecution takes
place.

(4.) A misdemeanour under this section shall not be punishable upon
summary conviction.

(5.) This section shall not apply to any ship employed exclusively in

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Penalty for
preventing
complaint or
obstructing
investigation.

Power of
receiver to
suppress
plunder and
disorder by
force.

trading or going from place to place in any river or inland water of which the whole or part is in any British possession.

485. If any person wilfully and without due cause prevents or obstructs the making of any complaint to an officer empowered to summon a naval court, or the conduct of any hearing or investigation by any naval court, he shall for each offence be liable to a fine not exceeding fifty pounds, or be liable to imprisonment, with or without hard labour, for any period not exceeding twelve weeks.

514. (1.) Whenever a vessel is wrecked, stranded, or in distress as aforesaid, and any person plunders, creates disorder, or obstructs the preservation of the vessel or of the shipwrecked persons or of the cargo or apparel of the vessel, the receiver may cause that person to be apprehended.

(2.) The receiver may use force for the suppression of any such plundering, disorder, or obstruction, and may command all Her Majesty's subjects to assist him in so using force.

(3.) If any person is killed, maimed, or hurt, by reason of his resisting the receiver or person acting under the orders of the receiver in the execution of the duties by this Part of this Act committed to the receiver, neither the receiver nor the person acting under his orders shall be liable to any punishment, or to pay any damages by reason of the person being so maimed, killed, or hurt.

Offences in respect of Wreck.

Taking wreck
to foreign
port.

535. If any person takes into any foreign port any vessel, stranded, derelict, or otherwise in distress, found on or near the coasts of the United Kingdom or any tidal water within the limits of the United Kingdom, or any part of the cargo or apparel thereof, or anything belonging thereto, or any wreck found within those limits, and there sells the same, that person shall be guilty of felony, and on conviction thereof shall be liable to be kept in penal servitude for a term not less than three years and not exceeding five years.

Interfering
with wrecked
vessel or
wreck.

536. (1.) A person shall not without the leave of the master board or endeavour to board any vessel which is wrecked, stranded, or in distress, unless that person is, or acts by command of, the receiver or a person lawfully acting as such, and if any person acts in contravention of this enactment, he shall for each offence be liable to a fine not exceeding fifty pounds, and the master of the vessel may repel him by force.

(2.) A person shall not—

(a) impede or hinder, or endeavour in any way to impede or hinder, the saving of any vessel stranded or in danger of being stranded, or otherwise in distress on or near any coast or tidal water, or of any part of the cargo or apparel thereof, or of any wreck;

(b) secrete any wreck or deface or obliterate any marks thereon; or

(c) wrongfully carry away or remove any part of a vessel stranded or in danger of being stranded, or otherwise in distress, on or near any coast or tidal water, or any part of the cargo or apparel thereof, or any wreck,

and if any person acts in contravention of this enactment, he shall be liable for each offence to a fine not exceeding fifty pounds, and that fine may be inflicted in addition to any punishment to which he may be liable by law under this Act or otherwise.

Summary pro-
cedure for

537. (1.) Where a receiver suspects or receives information that any

wreck is secreted or in the possession of some person who is not the owner thereof, or that any wreck is otherwise improperly dealt with, he may apply to any justice of the peace for a search warrant, and that justice shall have power to grant such a warrant, and the receiver, by virtue thereof, may enter any house or other place, wherever situate, and also any vessel, and search for, seize, and detain any such wreck there found.

(2.) If any such seizure of wreck is made in consequence of information given by any person to the receiver, on a warrant being issued under this section, the informer shall be entitled, by way of salvage, to such sum not exceeding in any case five pounds as the receiver may allow.

564. If any person in any proceeding under the provisions of this Part of this Act relating to salvage by Her Majesty's ships—

(a.) forges, assists in forging, or procures to be forged, fraudulently alters, assists in fraudulently altering, or procures to be fraudulently altered, any document; or

(b.) puts off or makes use of any forged or altered document, knowing the same to be so forged or altered; or,

(c.) gives or makes, or assists in giving or making, or procures to be given or made, any false evidence or representation, knowing the same to be false,

that person shall for each offence be liable to imprisonment, with or without hard labour, for a period not exceeding two years, or, on summary conviction, to imprisonment, with or without hard labour, for any period not exceeding six months.

607. If any pilot, when in charge of a ship, by wilful breach of duty or by neglect of duty, or by reason of drunkenness, either—

(a.) does any act tending to the immediate loss, destruction, or serious damage, of the ship, or tending immediately to endanger the life or limb of any person on board the ship; or

(b.) refuses or omits to do any lawful act proper and requisite to be done by him for preserving the ship from loss, destruction, or serious damage, or for preserving any person belonging to or on board the ship from danger to life and limb,

that pilot shall in respect of each offence be guilty of a misdemeanour, and, if a qualified pilot, shall also be liable to suspension or dismissal by the pilotage authority by whom he is licensed.

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concealment
of wreck.

Punishment
for forgery
and false
representations.

Penalty on
pilot en-
dangering
ship, life, or
limb.

PART XIII.—LEGAL PROCEEDINGS.

Prosecution of Offences.

680. (1.) Subject to any special provision of this Act and to the provisions hereinafter contained with respect to Scotland,—

(a.) an offence under this Act declared to be a misdemeanour, shall be punishable by fine or by imprisonment not exceeding two years, with or without hard labour, but may, instead of being prosecuted as a misdemeanour, be prosecuted summarily in manner provided by the Summary Jurisdiction Acts, and if so prosecuted shall be punishable only with imprisonment for a term not exceeding six months, with or without hard labour, or with a fine not exceeding one hundred pounds.

(b.) an offence under this Act made punishable with imprisonment for any term not exceeding six months, with or without hard labour, or by a fine not exceeding one hundred pounds, shall be prosecuted

Prosecution of
offences.

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Application of
Summary
Jurisdiction
Acts in certain
cases.

Appeal on
summary con-
viction.

Limitation of
time for sum-
mary proceed-
ing—56 & 57
Vict. c. 61.

summarily in manner provided by the Summary Jurisdiction Acts.

(2.) Any offence committed or fine recoverable under a bye-law made in pursuance of this Act may be prosecuted or recovered in the same manner as an offence or fine under this Act.

681. (1.) The Summary Jurisdiction Acts shall, so far as applicable, apply—

(a.) to any proceeding under this Act before a court of summary jurisdiction, whether connected with an offence punishable on summary conviction or not; and

(b.) to the trial of any case before one justice of the peace, where, under this Act, such a justice may try the case.

(2.) Where under this Act any sum may be recovered as a fine under this Act, that sum, if recoverable before a court of summary jurisdiction, shall, in England, be recovered as a civil debt in manner provided by the Summary Jurisdiction Acts.

682. Where a person is convicted summarily in England of an offence under this Act, and the fine inflicted or the sum ordered to be paid exceeds five pounds in amount, that person may appeal to quarter sessions against the conviction in manner provided by the Summary Jurisdiction Acts.

683. (1.) Subject to any special provisions of this Act neither a conviction for an offence nor an order for payment of money shall be made under this Act in any summary proceeding instituted in the United Kingdom, unless that proceeding is commenced within six months after the commission of the offence or after the cause of complaint arises as the case may be; or, if both or either of the parties to the proceeding happen during that time to be out of the United Kingdom, unless the same is commenced, in the case of a summary conviction within two months, and in the case of a summary order within six months, after they both first happen to arrive, or be at one time, within the United Kingdom.

(2.) Subject to any special provision of this Act neither a conviction for an offence nor an order for payment of money shall be made under this Act in any summary proceeding instituted in any British possession, unless that proceeding is commenced within six months after the commission of the offence or after the cause of complaint arises as the case may be; or if both or either of the parties to the proceeding happen during that time not to be within the jurisdiction of any court capable of dealing with the case, unless the same is commenced in the case of a summary conviction within two months, and in the case of a summary order within six months after they both first happen to arrive, or to be at one time, within that jurisdiction.

(3.) No law for the time being in force under any Act, ordinance, or otherwise, which limits the time within which summary proceedings may be instituted shall affect any summary proceeding under this Act.

(4.) Nothing in this section shall affect any proceeding to which the Public Authorities Protection Act, 1893, applies.

Jurisdiction.

Provision as to
jurisdiction in
case of
offences.

684. For the purpose of giving jurisdiction under this Act, every offence shall be deemed to have been committed and every cause of complaint to have arisen either in the place in which the same actually was committed or arose, or in any place in which the offender or person complained against may be.

685. (1.) Where any district within which any court, justice of the peace, or other magistrate, has jurisdiction either under this Act or under any other Act or at common law for any purpose whatever is situate on the coast of any sea, or abutting on or projecting into any bay, channel, lake, river, or navigable water, every such court, justice, or magistrate, shall have jurisdiction over any vessel being on, or lying or passing off, that coast, or being in or near that bay, channel, lake, river, or navigable water, and over all persons on board that vessel or for the time being belonging thereto, in the same manner as if the vessel or persons were within the limits of the original jurisdiction of the court, justice, or magistrate.

57 & 58 Vict.
c. 60.

—
*Merchant
Shipping Act,
1894.*

—
Jurisdiction
over ships
lying off the
coasts.

(2.) The jurisdiction under this section shall be in addition to and not in derogation of any jurisdiction or power of a court under the Summary Jurisdiction Acts.

686. (1.) Where any person, being a British subject, is charged with having committed any offence on board any British ship on the high seas, or in any foreign port or harbour, or on board any foreign ship to which he does not belong, or, not being a British subject, is charged with having committed any offence on board any British ship on the high seas, and that person is found within the jurisdiction of any court in Her Majesty's dominions, which would have had cognizance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, that court shall have jurisdiction to try the offence as if it had been so committed.

Jurisdiction
in case of
offences on
board ship.—
12 & 13 Vict.
c. 96.

(2.) Nothing in this section shall affect the Admiralty Offences (Colonial) Act, 1849.

687. All offences against property or person committed in or at any place either ashore or afloat out of Her Majesty's dominions by any master, seaman, or apprentice who at the time when the offence is committed is, or within three months previously has been, employed in any British ship shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner and by the same courts and in the same places as if those offences had been committed within the jurisdiction of the Admiralty of England; and the costs and expenses of the prosecution of any such offence may be directed to be paid as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England.

Offences com-
mitted by
British sea-
men at foreign
ports to be
within
Admiralty
jurisdiction.

691. (1.) Whenever in the course of any legal proceedings instituted in any part of Her Majesty's dominions before any judge or magistrate, or before any person authorised by law or by consent of parties to receive evidence, the testimony of any witness is required in relation to the subject matter of that proceeding, then upon due proof, if the proceeding is instituted in the United Kingdom that the witness cannot be found in that kingdom, or if in any British possession that he cannot be found in that possession, any deposition that the witness may have previously made on oath in relation to the same subject matter before any justice or magistrate in Her Majesty's dominions, or any British consular officer elsewhere, shall be admissible in evidence, provided that—

Depositions to
be received in
evidence when
witness cannot
be produced.

(a.) if the deposition was made in the United Kingdom, it shall not be admissible in any proceeding instituted in the United Kingdom; and

(b.) if the deposition was made in any British possession, it shall not be admissible in any proceeding instituted in that British possession; and

57 & 58 VICT.
c. 60.

*Merchant
Shipping Act,
1894.*

(c.) if the proceeding is criminal it shall not be admissible, unless it was made in the presence of the person accused.

(2.) A deposition so made shall be authenticated by the signature of the judge, magistrate, or consular officer before whom it is made; and the judge, magistrate, or consular officer shall certify, if the fact is so, that the accused was present at the taking thereof.

(3.) It shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition, and in any criminal proceeding a certificate under this section shall, unless the contrary is proved, be sufficient evidence of the accused having been present in manner thereby certified.

(4.) Nothing herein contained shall affect any case in which depositions taken in any proceeding are rendered admissible in evidence by any Act of Parliament, or by any Act or ordinance of the legislature of any colony, so far as regards that colony, or interfere with the power of any colonial legislature to make those depositions admissible in evidence, or to interfere with the practice of any court in which depositions not authenticated as hereinbefore mentioned are admissible.

Evidence, Service of Documents, and Declarations.

Proof of attes-
tation not
required.

694. Where any document is required by this Act to be executed in the presence of or to be attested by any witness or witnesses, that document may be proved by the evidence of any person who is able to bear witness to the requisite facts without calling the attesting witness or the attesting witnesses or any of them.

Admissibility
of documents
in evidence.

695. (1.) Where a document is by this Act declared to be admissible in evidence, such document shall, on its production from the proper custody, be admissible in evidence in any court or before any person having by law or consent of parties authority to receive evidence, and subject to all just exceptions, shall be evidence of the matters stated therein in pursuance of this Act or by any officer in pursuance of his duties as such officer.

(2.) A copy of any such document or extract therefrom shall also be so admissible in evidence if proved to be an examined copy or extract, or if it purports to be signed and certified as a true copy or extract by the officer to whose custody the original document was entrusted, and that officer shall furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same not exceeding fourpence for every folio of ninety words, but a person shall be entitled to have—

(a) a certified copy of the particulars entered by the registrar in the register book on the registry of the ship, together with a certified statement showing the ownership of the ship at the time being; and

(b) a certified copy of any declaration, or document, a copy of which is made evidence by this Act on payment of one shilling for each copy.

(3.) If any such officer wilfully certifies any document as being a true copy or extract knowing the same not to be a true copy or extract, he shall for each offence be guilty of a misdemeanour, and be liable on conviction to imprisonment for any term not exceeding eighteen months.

(4.) If any person forges the seal, stamp, or signature of any document to which this section applies, or tenders in evidence any such document with a false or counterfeit seal, stamp, or signature thereto, knowing the

same to be false or counterfeit, he shall for each offence be guilty of a 57 & 58 Vict. felony, and be liable to penal servitude for a term not exceeding two years with or without hard labour, and whenever any such document has been admitted in evidence, the court or the person who admitted the same may on request direct that the same shall be impounded, and be kept in the custody of some officer of the court or other proper person, for such period or subject to such conditions as the court or person thinks fit.

c. 60.

*Merchant
Shipping Act,
1894.*

696. (1.) Where for the purposes of this Act, any document is to be served on any person, that document may be served—

*Service of
documents.*

- (a.) in any case by delivering a copy thereof personally to the person to be served, or by leaving the same at his last place of abode; and
- (b.) if the document is to be served on the master of a ship, where there is one, or on a person belonging to a ship, by leaving the same for him on board that ship with the person being or appearing to be in command or charge of the ship; and
- (c.) if the document is to be served on the master of a ship, where there is no master, and the ship is in the United Kingdom, on the managing owner of the ship, or, if there is no managing owner, on some agent of the owner residing in the United Kingdom, or where no such agent is known or can be found, by affixing a copy thereof to the mast of the ship.

(2.) If any person obstructs the service on the master of a ship of any document under the provisions of this Act relating to the detention of ships as unseaworthy, that person shall for each offence be liable to a fine not exceeding ten pounds, and, if the owner or master of the ship is party or privy to the obstruction, he shall in respect of each offence be guilty of a misdemeanour.

697. Any exception, exemption, proviso, excuse, or qualification, in relation to any offence under this Act, whether it does or does not accompany in the same section the description of the offence, may be proved by the defendant, but need not be specified or negatived in any information or complaint, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant.

*Proof, &c., of
exemption.*

698. Any declaration required by this Act to be taken before a justice of the peace or any particular officer may be taken before a commissioner for oaths.

Declarations.

Application of Penalties and Costs of Prosecutions.

699. (1.) Where any court, justice of the peace, or other magistrate, imposes a fine under this Act for which no specific application is herein provided, that court, justice of the peace, or magistrate, may if they think fit direct the whole or any part of the fine to be applied in compensating any person for any wrong or damage which he may have sustained by the act or default in respect of which the fine is imposed, or to be applied in or towards payment of the expenses of the proceedings.

*Application of
penalties.*

(2.) Subject to any directions under this section or to any specific application provided under this Act, all fines under this Act shall, notwithstanding anything in any other Act—

- (a.) if recovered in the United Kingdom, be paid into the Exchequer in such manner as the Treasury may direct, and be carried to and form part of the Consolidated Fund; and

57 & 58 Vict.
c. 60.

*Merchant
Shipping Act,
1894.*

Expenses of
prosecution
of misde-
meanour.

Payment of
costs of prose-
cution of
offences com-
mitted in
Admiralty
jurisdiction.

Offences as to
use of forms.

(b.) if recovered in any British possession, be paid over into the public treasury of that possession, and form part of the public revenue thereof.

700. Where an offence under this Act is prosecuted as a misdemeanour, the court, before whom the offence is prosecuted may in England make the same allowances and order payment of the same costs and expenses as if the offence were a felony, and in any other part of Her Majesty's dominions may make such allowances and order payment of such costs and expenses as are payable or allowable upon the trial of any misdemeanour or under any law for the time being in force therein.

701. Such costs and expenses of and incidental to any prosecution for a felony or misdemeanour as are by law payable out of any county or local rate shall, where the felony or misdemeanour has been committed within the jurisdiction of the Admiralty of England be paid in the same manner and subject to the same regulations as if the felony or misdemeanour had been committed in the county in which the same is heard and determined, or where the same is heard and determined at the Central Criminal Court as if the same had been committed in the county of London, and all sums properly paid out of any county or other local rate in respect of those costs and expenses shall be repaid out of money provided by Parliament.

722. (1.) If any person—

(a) forges, assists in forging, or procures to be forged, the seal or any other distinguishing mark of the Board of Trade on any form issued by the Board of Trade under this Act; or

(b) fraudulently alters, or assists in fraudulently altering, or procures to be fraudulently altered, any such form,

that person shall in respect of each offence be guilty of a misdemeanour.

(2.) If any person—

(a) when a form approved by the Board is, under the Second Part of this Act, required to be used, uses without reasonable cause a form not purporting to be a form so approved; or

(b) prints, sells, or uses any document purporting to be a form approved by the Board of Trade, knowing the same not to be the form approved for the time being, or not to have been prepared or issued by the Board of Trade,

that person shall, for each offence, be liable to a fine not exceeding ten pounds.

Short Title and Commencement.

Short title.

747. This Act may be cited as "The Merchant Shipping Act, 1894."

Commence-
ment.

748. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-five.

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ADULTERATION OF FOOD. See sub "Sale of Food and Drugs Acts."

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APOTHECARY. — "*Acting or practising*" without certificate — *Penalty*—*Offence*—*Several acts on same day only one offence*—*Apothecaries Act* (55 Geo. 3, c. 194), s. 20.—By the 20th section of the *Apothecaries Act* (55 Geo. 3, c. 194), if any person shall act or practise as an apothecary without having obtained a certificate, every person so offending shall for every such offence forfeit and pay the sum of twenty pounds. Three separate actions were brought against the defendant to recover three separate penalties for having treated and prescribed for three distinct patients on three separate occasions on the same day without having a certificate, contrary to the above section: Held, that the three acts of practising constituted only one offence of "acting or practising" within the meaning of the section, for which only one penalty could be recovered. (*The Apothecaries Company v. Jones.* Nov. 1892. Q. B. Div.) 588.

APPEAL. — *Criminal cause or matter* — *Habeas corpus* — *Libel* — *Misdirection*, see sub "Practice." *Notice of appeal to quarter sessions*, see sub "Justices." *Order for separation*, see "Husband and Wife." *Special case*, see "Practice." *Summary conviction*—*Summary trial of adult*—*Indictable offence*, see sub "Justices."

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ARSON.—*Setting fire to dwelling-house, a person being therein*—24 & 25 Vict. c. 97, ss. 2, 7.—A prisoner may be indicted under 24 & 25 Vict. c. 97, s. 2, with setting fire to a dwelling-house, a person being therein, though the prisoner himself, who set fire to the house, was the only person therein at the time. (*Reg. v. Pardoe.* Feb. 1894. Ld. Coleridge, C.J.) 715.

ASSAULT. — *Complainant not appearing before magistrate*—*Charge dismissed*—*No evidence taken on oath*—"*Hearing upon the merits*"—*Certificate of dismissal*—*Power to grant such certificate*—*Whether such certificate is a bar to subsequent civil proceedings*—24 & 25 Vict. c. 100, ss. 44, 45.—Sect. 44 of 24 & 25 Vict. c. 100, enacts that, upon the hearing of any case of assault or battery "upon the merits," if the justices deem the offence not to be proved, they shall dismiss the complaint and shall give to the party against whom the complaint was preferred a certificate stating the fact of such dismissal; and sect. 45 provides that the person who has obtained such certificate of dismissal "shall be released from all further or other proceedings, civil or criminal, for the same cause." Held, that a magistrate has no jurisdiction under sect. 44 to grant a certificate on the dismissal of a summons for assault, when the complainant does not appear and when no evidence on oath is taken, as such a hearing is not a "hearing upon the merits," and if the magistrate does grant a certificate, such certificate is not a binding certificate, both parties not having been present, and the case not having been argued and decided on the facts. Held also (Lord Coleridge, C.J. doubting, but not dissenting), that, if in such a case the magistrate

grants a certificate of dismissal, the judge in a subsequent action for damages in respect of the same assault is not bound by such certificate, but has power to go behind the certificate and to inquire into the facts, and to determine whether facts existed which gave the magistrate jurisdiction to grant the certificate. (*Reed v. Nutt*. March, 1890. Q. B. Div.) 86.

ASSAULT.—*Corporal punishment of pupil by schoolmaster*—*Board school*—*Pupil's misconduct on the way to school and out of school hours*—*Extent of schoolmaster's authority under the Elementary Education Acts*—*Code of Regulations by the Education Department, 1892*—33 & 34 Vict. c. 75, s. 97.—The appellant, the head master of a Board School, inflicted corporal punishment on a pupil belonging to the school, for an offence committed by the pupil when on the way to the school and out of school hours. By a Code of Regulations issued by the Education Department, under the Elementary Education Act, 1870, a grant is given to the school, provided that the teachers and managers satisfy the inspector that all reasonable care is taken in the ordinary management of the school to bring up the children in habits of punctuality, of good manners and language, &c., and also to impress upon the children the importance of cheerful obedience to duty, of consideration and respect for others, &c. The appellant having been summarily convicted of assaulting the pupil in respect of the punishment so inflicted, upon a case stated by the convicting magistrates: Held, that, besides the reasonable authority of a parent or guardian which is delegated to the schoolmaster, the appellant had also the power to inflict corporal punishment upon a pupil for misconduct on the way to and from the school and out of school hours. (*Cleary, app. v. Booth*, resp. Feb. 1893. Q. B. Div.) 611.

— *Criminal Law Amendment Act*. See sub "Practice."

— *Indictment for unlawful and carnal knowledge of girl between thirteen and sixteen, and for indecent assault*—*Conviction for common assault*.—Upon an indictment the first count of which charged the prisoner under sect. 5 of the Criminal Law Amendment Act, 1885, with unlawfully and carnally knowing a

girl between the ages of thirteen and sixteen years, and the same count of which charged him with an indecent assault upon the girl: Held, that the prisoner could be convicted of a common assault. (*Reg. v. Bostock*. Dec. 1893. Charles, J.) 700.

— *Manslaughter*—*Plea of autrefois convict*. See "Practice."

— *Protection of property from fire*—*Statutory fire brigade*—*Control of premises during a fire*—*Member of volunteer fire brigade excluded by member of local board fire brigade*—*Authority to exclude public*—*Towns Police Clauses Act, 1847* (10 & 11 Vict. c. 89), s. 32—*Public Health Act, 1875* (38 & 39 Vict. c. 55), s. 171.—By sect. 171 of the Public Health Act, 1875, incorporating sect. 32 of the Towns Police Clauses Act, 1847, it is provided with respect to fires that an urban local authority "may employ a proper number of persons to act as firemen, and may make such rules for their regulation as they think proper." The respondent, a member of the fire brigade established under the above section by the local board of Hounslow, was stationed at the gate of a house in which the brigade was engaged in extinguishing a fire, with instructions from the foreman to allow no person to pass through. The appellant, a member and wearing the uniform of a volunteer fire brigade of Hounslow, the foreman of which was already upon the burning premises, endeavoured to force his way in for the purpose of helping to extinguish the fire, and in so doing assaulted the respondent. Held, that there was no right in the appellant as one of the public, to assist in putting out the fire; and, further, that the authority conferred upon the fire brigade of the local board by the above sections extended to excluding from the premises persons whose presence might impede the work of extinguishing the fire. (*Carter, app. v. Thomas*, resp. April 1893. Q. B. Div.) 664.

— *Recognisances for good behaviour*. See sub "Practice."

— *Order for separation*—*Appeal*. See "Husband and Wife."

ATTEMPT TO DISCHARGE LOADED FIRE-ARM.—*Intent*—*Question for jury*—*Evidence*.—Where a person does an act the natural consequence of which is criminal, but such consequence is prevented by extraneous causes, he is never

theless to be taken to have intended that the natural consequence of his act should result, that is to say, he is to be considered as having intended to commit the crime which would have resulted had he not been prevented from completing his act. Where, therefore, in support of a conviction for attempting to discharge a loaded firearm with intent to do grievous bodily harm, the evidence was that the prisoner had presented a loaded revolver at another person, but had been prevented from discharging it by a third person: Held, that the question as to the intent with which the prisoner presented the revolver was for the jury to decide; that the jury might reasonably infer that the prisoner intended to do that which he was prevented from doing; and that there was therefore sufficient evidence to support the conviction. (*Reg. v. St. George*, 9 C. & P. 483; and *Reg. v. Lewis*, 9 C. & P. 523, overruled. (*Reg. v. Duckworth*. Feb. C. C. R.) 495.

ATTEMPT TO MURDER.—*Attempt to discharge a loaded arm—Revolver loaded in some of its chambers—Chamber attempted to be discharged unloaded—Failure of attempt “from want of priming or from any other cause”*—24 & 25 Vict. c. 100, ss. 14, 19.—A revolver which is loaded in some of its chambers, and which is capable of being discharged if the trigger is drawn a sufficient number of times, is a loaded arm within the meaning of 24 & 25 Vict. c. 100, s. 14, notwithstanding the fact that some of its chambers are not loaded, including the chamber upon which the hammer would fall upon the trigger being drawn in the usual way for the first time, and also notwithstanding the fact that such revolver is incapable of being discharged by merely drawing the trigger unless the trigger were to be drawn a sufficient number of times to cause the chambers to revolve and the hammer to fall upon a loaded chamber. Upon an indictment for attempting to discharge a loaded arm with intent to murder, the evidence for the prosecution was that the prisoner had pointed at the prosecutor a revolver loaded in some of its chambers with ball cartridges, but not in others, saying that he would shoot him, and that he had pulled the trigger of the revolver, but that the hammer had fallen upon a chamber which contained an empty cartridge case. Held, that the revolver was a loaded arm within the meaning of

24 & 25 Vict. c. 100, s. 14; and that the prisoner could upon the evidence be convicted of attempting to discharge a loaded arm with intent to murder the prosecutor. (*Reg. v. Jackson*. Aug. 1890. Charles, J.) 104.

AUTREFOIS CONVICT. See sub “Practice.”
BAILEE.—*Embezzlement and fraud as.* See “Extradition.”

BANKRUPTCY.—*Application to commit—Privilege of Parliament.*—The privilege attaching to members of Parliament, which protects them from arrest for contempt of Court in not obeying civil process, does not extend to cases where the contempt is in its nature or by its incidents of a criminal character. Where a member of Parliament refused to submit to be examined on oath pursuant to a summons issued under sect. 27 of the Bankruptcy Act, 1883, on application to commit him for contempt of Court: Held, that the defence of parliamentary privilege was an answer to the application, and that an order for committal could not be made. (*Re Armstrong; Ex parte Lindsay*. Aug. 1891. Bkcy. Williams, J.) 349.

BASTARDY.—*Service of summons—Last place of abode—Jurisdiction of justices—Certiorari—Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4.*—Under sect. 4 of the Bastardy Laws Amendment Act, 1872, which provides that the justices may make a bastardy order, in the absence of the defendant, upon proof that the summons “was left at his last place of abode six days at least before the petty sessions,” the summons must be left at his present place of abode, if he has a place of abode at the time of the service, and if he has none, then at his last place of abode. If at the time of the service the defendant has his place of abode out of the jurisdiction, the summons cannot be served at all. A bastardy summons was left at the defendant’s last place of abode in England, and at the hearing the justices found, in his absence, that the summons had been duly served upon him, and made an order against him. Upon an application for a *certiorari* it appeared, from fresh evidence, that the defendant was in America, and had a place of abode there when the summons was served. Held (making absolute a rule for a *certiorari*), that the Court had power to review the decision of the justices upon the question of service; that the summons had not

been duly served under sect. 4, and that the order was therefore made without jurisdiction. *Reg. v. Evans*, 19 L. J. 151, M.C., followed. (*Reg. v. Farmer and another, Justices of Salford*. Dec. 1891. Ct. of App.) 413.

BETTING.—See "Gaming."

BIGAMY.—*Jurisdiction of Colonial Courts—Law of New South Wales—Criminal Law Amendment Act*, 1883 (46 Vict. No. 17), s. 54.—The Criminal Law Amendment Act, 1883, of New South Wales, sect. 54, enacts, "Whosoever, being married, marries another person during the life of the former husband and wife, whosoever such marriage takes place, shall be liable to penal servitude for seven years." Held, that the word "whosoever" must be construed "whosoever, being married, and amenable at the time of the offence committed to the jurisdiction of the colony of New South Wales;" and the word "whosoever" must be construed "whosoever in the colony the offence is committed." The appellant married a wife in New South Wales in 1872. In 1889, during her lifetime, he went through the form of marriage with another woman in the United States of America." Held, that the Courts of New South Wales had no jurisdiction to try him for bigamy in respect of such second marriage. Judgment of the Court below reversed. (*MacLeod v. Attorney-General for New South Wales*. July, 1891. Priv. Coun.) 341.

— See also sub "Evidence."

BILL OF EXCHANGE.—*Conversion*. See "Larceny."

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BREAD.—*Sale otherwise than by weight*. See "Weights and Measures."

BRIBERY.—*Offer of bribe to servant to sell*. See "Conspiracy to cheat and defraud."

CENTRAL CRIMINAL COURT.—*Jurisdiction of High Court*. See sub "Certiorari."

CERTIORARI.—*Central Criminal Court—Power of High Court to direct writ of certiorari to Central Criminal Court—Indictment—Immaterial averment—Indictment for publishing libel upon directors—Necessity of proving that the directors were properly appointed*.—The High Court has no jurisdiction to issue a writ of certiorari, directed to the Central Criminal Court, to remove a

conviction obtained in the Central Criminal Court, for the purpose of having the same quashed. Upon the trial of an indictment for publishing a libel upon the directors of a company, it is not necessary to prove that the promoters were the *de jure* directors of the company, and properly appointed as such, it being admitted that they were the acting directors, and the libel being published upon them as such acting directors, and the averment that they were directors is an immaterial averment. (*Reg. v. Boaler*. Aug. 1892 Q. B. Div.) 569.

COAL MINES REGULATION ACT. See "Mines."

COMPOUNDING MISDEMEANOUR.—*Agreement not to sue for sums misappropriated—Validity of consideration—Stifling a prosecution*.—C., the secretary of a building society, misappropriated various sums received by him as such secretary. Upon these frauds being brought to the knowledge of the directors they required him, under threats of criminal proceedings, to make good his defalcations by a specified day. C. then applied to the plaintiffs, who were his relatives, for assistance, and mentioned that he was in danger of being prosecuted. The plaintiffs thereupon signed a document addressed to the society which provided as follows: "In consideration of your not suing C. to recover the sum of £351, being the whole amount owing by him to you, we undertake to see you paid the sum of £261." The document went on to state that a portion of the money was to be paid in cash, and the balance secured by promissory notes. In pursuance of that undertaking the plaintiffs gave two promissory notes to the society. The plaintiffs would not have given this undertaking except for the purpose of saving C. from criminal proceedings, and this fact was known to the directors. Held, that the consideration for the agreement, being the forbearance of the society to take criminal proceedings against C., was illegal, and that the agreement which was founded upon it was therefore void. Held, therefore, that the promissory notes must be set aside. *Ward v. Lloyd*, 7 Scott N. R. 499; 7 Man. & G. 785, and *Flower v. Sadler*, 10 Q. B. Div. 572, explained and distinguished. (*Jones v. Merionethshire Permanent Benefit Building Society*. June, 1891. Ch. Div.) 334.

COMPOUNDING MISDEMEANOUR (cont.).—

Compromise of indictment for nuisance to highway—Illegal consideration—Specific performance.—An agreement to compromise an indictment for a nuisance is not less illegal than an agreement to compromise a prosecution for any other criminal offence. Dictum of James, L.J. in *Fisher v. Apollinaris Company* (32 L. T. Rep. N. S. 628; L. Rep. 10 Ch. 297) not followed. The defendants in the course of working certain quarries had obstructed a highway in the district of the plaintiffs. The plaintiffs thereupon indicted the defendants for the obstruction, but before the case was heard a compromise was entered into, under which the defendants agreed to restore the highway within a limited time, and the plaintiffs agreed that the indictment should during such time lie in the office of the Court, and that upon the work being completed they would consent to a verdict of "not guilty" on the indictment. The highway not having been restored as agreed, the plaintiffs commenced the present action for specific performance by the defendants of the terms of the compromise: Held, that the agreement was founded on an illegal consideration, and could not therefore be enforced. (*Windhill Local Board of Health v. Vint*. May, 1890. Stirling, J.) 41.

— See also sub "Stifling Prosecution."

CONSPIRACY AND PROTECTION OF PROPERTY. See "Intimidation" and sub "Practice."

CONSPIRACY TO CHEAT AND DEFRAUD.—

Sale of goods by servant at less than authorised price—Offer of bribe to induce servant to sell—Soliciting to conspire to cheat.—A servant who, in order to make a profit for himself, sells his master's goods at less than their proper market value, thereby defrauds his master of the sum which represents the difference between the value of the goods and the price at which the servant has sold them. Where, therefore, a person was indicted for soliciting a servant to conspire to cheat and defraud his master, and it was proved that such person had offered a bribe to the servant as an inducement to him to sell certain goods of his master at less than their value: Held, that he might properly be convicted of such conspiracy. (*Reg. v. De Kromme*. Feb. 1892. O. C. R.) 492.

CONTEMPT OF COURT.—*Appeal.* See sub "Practice."

CONTINUING OFFENCE. See "Justices."

CONVICTION.—*Form.* See sub "Practice."

CORRUPT PRACTICES.—*Procedure.* See sub "Practice."

COSTS. See sub "Justices" and sub "Practice."

COUNTY COUNCIL.—*Justices—Standing joint committee—Police rates—Police districts, powers of altering—Police Act, 1840 (3 & 4 Vict. c. 88), ss. 3, 27, 28—Local Government Act 1888 (51 & 52 Vict. c. 41), ss. 3, 9, 28, 29, 30.*—The powers conferred upon the justices in quarter session by sects. 3 and 27 of the Police Act, 1840, of dividing a county, or any part thereof, into police districts, and of, from time to time, altering the extent of such police districts, and the number of constables to be appointed for each, is under the Local Government Act, 1888, vested in the standing joint committee of the quarter sessions and county council. (*Ex parte The Leicestershire County Council and the Standing Joint Committee of the County of Leicester; Re The Local Government Act, 1888*. Nov. 1890. Q. B. Div.) 205.

CRIMINAL CAUSE OR MATTER. See sub "Practice."

CRIMINAL LAW AMENDMENT ACT, 1885.—*Aiding and abetting—Soliciting and inciting—Offence against—Criminality of girl under sixteen—48 & 49 Vict. c. 69, s. 5.*—A girl under the age of sixteen cannot be convicted of abetting the commission upon herself of an offence against the Criminal Law Amendment Act, 1885, nor can she be convicted of soliciting and inciting a male person to commit such an offence upon her. (*Reg. v. Tyrell*. Dec. 1893. O. C. R.) 716.

— See also sub "Assault," "Evidence," "Infant," and "Practice."

CRIMINAL OFFENCE.—*Statutory duty—Absence of penalty.* See "Justices," see also sub "Practice."

CRIMINAL PROCEEDINGS.—*Libel—Appeal.* See "Practice."

CRUELTY TO ANIMALS.—*Nonfeasance—No evidence of guilty knowledge of animal's condition—Prevention of Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92),*

s. 2.—The appellant, a receiver of large consignments of cattle, which he was supposed to personally receive and attend to, had not removed the head ropes from the cattle (which arrived in port on Saturday) until the Monday following. The magistrates having convicted the defendant of cruelty for not removing the head ropes, the defendant appealed on the ground that there was no guilty knowledge on his part, and that there was no intentional cruelty on his part: Held, there being no evidence of a guilty knowledge on the appellant's part, or that the appellant wilfully abstained from the knowledge of the alleged cruelty, the conviction must be quashed. (*Elliott v. Osborn*. April, 1891. Q. B. Div.) 346.

CRUELTY TO ANIMALS.—*Rabbit coursing*—*Wild rabbits kept in confinement*—*Domestic animals*—*Cruelty to Animals Acts, 1849 (12 & 13 Vict. c. 92) and 1854 (17 & 18 Vict. c. 60)*.—Wild rabbits caught in nets and confined for five or six days in boxes, and kept alive by being fed, are not domestic animals within 12 & 13 Vict. c. 92, and 17 & 18 Vict. c. 60. The coursing of such rabbits in an inclosure is therefore not cruelly torturing animals within the meaning of sect. 3 of the Cruelty to Animals Act, 1849. (*Aplin v. Porritt and others*. May, 1893. Q. B. Div.) 662.

—*Several charges in summons*. See sub "Practice."

DESERTION. See "Husband and Wife."

DETENTION OF GOODS.—*Order for restitution*—*Recovery of goods in police-court under 2 & 3 Vict. c. 71, s. 40*—*Action for consequential damage in the County Court*—*Res judicata*.—A person whose goods have been detained by a railway company, and who has obtained an order in the police-court under the Act for regulating the police-courts in the metropolis (2 & 3 Vict. c. 71, s. 40) for the delivery of the goods, is not by that order debarred from pursuing by means of an action in the County Court his further claim for damages for their detention. (*Midland Railway Company v. Martin and Co.* June, 1893. Q. B. Div.) 687.

DIRECTOR OF PUBLIC PROSECUTIONS.—*Refusal to disclose source of information*. See sub "Evidence."

DISMISSAL OF COMPLAINT.—*No evidence given*—*Certificate*. See sub "Assault."

DISORDERLY HOUSE.—*Warrant for arrest of accused*. See sub "Justices."

DOGS ACT. See "Practice."

ELECTION COURT.—*Jurisdiction*—*Corrupt Practices*. See sub "Practice."

ELEMENTARY EDUCATION ACT.—*Conviction of member of school board*. See sub "School Board."

—*Schoolmaster's authority*. See sub "Assault."

EMBEZZLEMENT.—*Clerk or servant*—*Director of company employed to collect moneys on behalf of company*—24 & 25 Vict. c. 96, s. 68.—The fact that a person employed to collect moneys on behalf of a company of which he is a shareholder, is also a director of such company does not prevent such person from being convicted of embezzling moneys collected by him on behalf of the company, within the meaning of 24 & 25 Vict. c. 96, s. 68. (*Reg. v. Steward*. Dec. 1893. C. C. R.) 723.

—*Servant*—*Deputy*—*Employment by overseer of person to collect poor rates and keep books*—24 & 25 Vict. c. 96, s. 68.—A person employed to collect moneys which it is the duty of his employer to collect, but who is at liberty to collect such moneys as and when he thinks proper, is not a clerk or servant within 24 & 25 Vict. c. 96, s. 68. In support of an indictment under that section for embezzlement it was proved that the prisoner had been employed by an illiterate overseer of the poor of a parish to collect the rates and keep the books, which it was the duty of such overseer to collect and keep during a period of six months; and that for so doing the prisoner was to receive the sum of 3*l*. During the six months the overseer gave no orders to the prisoner, and did not interfere in the collection of the rates or the keeping of the books; and the prisoner at the expiration of the six months made default in accounting for certain of the moneys collected by him. The prisoner having been convicted of embezzling such moneys: Held, upon a case reserved for the consideration of this Court, that the prisoner was not the servant of the overseer within the meaning of the section, and was therefore wrongly convicted. *Reg. v. Bowers* (L. Rep. 1 C. C. R. 41; 14 L. T. Rep. N. S. 671; 10 Cox C. C. 250; 35 L. J. 206 M. C.; 12 Jur. N. S. 550; 14 W. R.

803) followed, but doubted. (*Reg. v. Harris*. April 1893. C. C. R.) 656

— See also sub "Extradition."

EVIDENCE.—Admissibility of confession—Inducement held out indirectly—Possibility of advantage to be inferred from language of person in authority.—A confession of guilt, in order to be admissible in evidence in criminal proceedings, must have been made voluntarily, and not in response to any threat or to any suggestion of advantage to be inferred either directly or indirectly from language used by a person in a position of authority in connection with the prosecution of the person by whom the confession was made. In order to test the admissibility of a confession, the presiding judge should ask himself, "Is it proved affirmatively that the confession was free and voluntary—that is, was it preceded by any inducement held out by a person in authority to make a statement?" If the answer to such question be in the affirmative, and the inducement is not clearly shown to have been removed before the statement was made, evidence of the statement is inadmissible. (*Reg. v. Thompson*. April, 1893. C. C. R.) 641.

Admissibility of confession—Prisoner's answers to constable's questions—Statement of third party read to prisoner—Constable's duty on arrest.—On the arrest of a prisoner, a constable has no right to ask questions, and if the prisoner answers, the answers are not admissible in evidence against him. If a third party make a statement which is taken down in writing, and read over by a constable to a prisoner, neither it nor the conversation induced by it are admissible in evidence, because it is an attempt by the constable to manufacture evidence, and that he has no right to do. A constable has no right to charge a prisoner with an offence in respect of which he is not in possession of a warrant. (*Reg. v. Male and Cooper*. Dec. 1893. Cave, J.) 689.

Admissibility—Criminal acts other than those covered by the indictment—Criminal Law Amendment Act of New South Wales (46 Vict. No. 17), s. 423—"Substantial wrong or other miscarriage of justice."—Evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment is admissible in a criminal case if it be relevant to an issue

before the jury, as bearing upon the question whether the act alleged in the indictment was designed or accidental, or to rebut a line of defence. The appellants were indicted for the murder of an infant child whom they had taken in to nurse upon payment of a small sum, alleging that they desired to adopt it as their own. Held (affirming the judgment of the court below), that evidence that several other infants had been received by the prisoners on like representations, and upon payment of sums inadequate to support them for more than a short time, and that bodies of infants had been found buried in the gardens of several houses occupied by the prisoners, was admissible. *Reg. v. Geering* (18 L. J. 215, M. C.) approved. *Reg. v. Oddy* (2 Den. 264; 20 L. J. 198, M. C.) distinguished. In a case where material evidence has been improperly admitted the New South Wales Criminal Law Amendment Act (46 Vict., No. 17), s. 423, which provides "that no conviction, or judgment thereon, shall be reversed, arrested, or avoided on any case stated, unless for some substantial wrong or other miscarriage of justice," does not empower the Court to affirm a conviction if they are of opinion that there was sufficient evidence to support it independently of the evidence improperly admitted, unless such inadmissible evidence was directed to some merely formal matter. (*Makin and Wife v. Attorney-General for New South Wales*. Dec. 1893. Priv. C.) 704.

— See also sub "Merchandise Marks Act, 1887."

Affirmation—Duty of judge—Conditions precedent to affirmation—Oaths Act, 1888.—Where a witness is desirous of making an affirmation instead of taking an oath, it is the duty of the judge presiding at the trial to himself examine the witness, and ascertain that he objects to being sworn on the ground either that he has no religious belief, or that the taking of an oath is contrary to his religious belief. A witness who states that he has a religious belief cannot be allowed to affirm. (*Reg. v. William Moore and Alice Brooks*. Jan. 1892. C. C. R.) 458.

Aiding and Abetting—Joint indictment—Statements by one prisoner in absence of the other—Admissibility as evidence against both prisoners—Infer-

once by jury—Debtors Act, 1869, s. 13, sub-sect. 2—Practice—Motion to quash counts in an indictment—When motion should be made.—Upon the trial of an indictment in which two persons were charged, the one, a bankrupt, with disposing of goods with intent to defraud his creditors, and the other, the bankrupt's brother-in-law and manager, with aiding and abetting him therein: Held, that statements made by the bankrupt at the time he obtained the goods were admissible as evidence against both the prisoners, although such statements were made in the absence of the other prisoner: Held, also, that the jury might infer from the relationship proved to have existed between the parties that the prisoner who had received the goods from the bankrupt, and who was therefore charged with aiding and abetting, was at the time he received such goods aware of the fact that the goods had not been paid for by the bankrupt. *Semble*, that where it is intended to take objection to any of the counts in an indictment, the proper course is to move to have such counts struck out of the indictment before plea pleaded, and that it is too late to take such an objection at the close of the case for the prosecution. (*Reg. v. Chapple and Bolingbroke*. Jan. 1892. C. C. R.) 455.

EVIDENCE.—*Attempt to commit felony.* See sub "Practice."

— *Attempt to discharge firearm.* See sub "Attempt."

— *Bigamy—Jewish marriage—Written contract—Insufficiency of proof of religious ceremony.*—In order to prove a Jewish marriage, it is not sufficient to produce a witness who was present at the religious ceremony in the synagogue, a written contract between the parties being essential to the validity of the marriage, production and proof of the execution of such documents is necessary. (*Reg. v. Althausen*. April, 1893. C. C. Ct.) 630.

— *Breach of the peace.* See sub "Unlawful Assembly."

— *Criminal Law Amendment Act.* See sub "Practice."

— *Defendant.* See sub "Intimidation."

— *False pretences—Guilty knowledge.* See sub "Extradition."

— *Manufacture of false evidence—Attempt to pervert due course of justice*

— *Judicial tribunal—Arbitrators—Tampering with arbitration samples.*—It is not necessary in order to complete the offence of attempting to pervert the course of justice by the manufacture of false evidence, that such evidence should be made use of. To tamper with evidence to be laid before arbitrators appointed by the parties to a contract for the determination of differences arising under such contract, is to attempt to pervert the ends of justice by misleading a tribunal of a judicial nature. The prisoner was indicted for having unlawfully, knowingly, and designedly altered the character of the contents of certain sample bags of wheat which had become, and were evidence to be used before arbitrators appointed in accordance with the terms of a contract to decide any question that might be in dispute between the buyers and sellers of a cargo of wheat, with intent thereby to pass the same off as true and genuine samples of the bulk of such cargo, and thereby to injure and prejudice the buyers of the cargo, and to pervert the due course of law and justice. By a contract for the sale of a cargo of wheat, certain stipulations were made for the settling of any disputes that might arise by arbitration, and for the purposes of being used as evidence in any such arbitration, samples were taken from the bulk by the prisoner on behalf of the seller, and by another person on behalf of the purchaser. Such samples were sealed and taken to the prisoner's house, and while they were in his possession the prisoner tampered with them by extracting the contents of the bags, which he sealed and replaced in the bags without breaking the seals, thereby producing very much better samples. The samples so altered were forwarded by the prisoner to the London Corn Trade Association, who by the terms of the contract were to appoint arbitrators in default of arbitrators being appointed by the parties should any question be in dispute, and who were also to elect a committee of appeal if necessary for the purpose of hearing and finally deciding any appeal against the award of the arbitrators. No arbitration in fact ever took place. Held, that the indictment was good, and alleged an offence, although it did not allege that an arbitration took place, or that the samples were used as evidence; that the offence committed by the prisoner

was not a mere private cheat, but was an attempt to mislead a tribunal of a judicial nature by the manufacture of false evidence; and that it was therefore not necessary that the evidence should have been in fact used in order to constitute the offence charged. Held also, that, inasmuch as the prisoner had forwarded the samples when altered to the Association in London, and had thereby put it out of his power to retract what he had done, he had done all that he could to pervert the due course of law and justice, and was therefore rightly convicted upon the evidence of the offence with which he was charged. (*Reg. v. Vreones*. Jan. 1891. C. C. R.) 257.

— *Perjury—Admissibility of statements made by judge of High Court in delivering judgment in action in which perjury alleged to have been committed.*—Statements made by a judge in giving judgment in an action are not admissible as evidence in the prosecution of a witness for perjury alleged to have been committed whilst giving evidence in such action. (*Reg. v. Britton*. Feb. 1893. C. C. Ct.) 627.

— See also sub "Injury."

— "Unlawful and carnal knowledge" *Necessity for proof of emission as well as of penetration—Criminal Law Amendment Act, 1885—48 & 49 Vict. c. 69, s. 4.*—In order to support a conviction for unlawful and carnal knowledge of a female, it is not necessary to prove that emission took place, proof of penetration being sufficient. (*Reg. v. Marsden*. May, 1891. C. C. R.) 297.

— *Witness—Director of Public Prosecutions—Refusal to disclose source of information—Prosecution of Offences Act, 1879 (42 & 43 Vict. c. 22)—Prosecution of Offences Act, 1884 (47 & 48 Vict. c. 58).*—In the case of a public prosecution, neither upon the criminal trial nor upon the trial of any subsequent civil proceedings arising out of it can a witness be asked to disclose the name of the persons who have given information, or the nature of the information given. The only exception to this rule is, that upon the trial of a prisoner the judge may, in his discretion, allow such questions if it appears to him to be necessary or right to do so in order to show the prisoner's innocence. Prosecutions instituted or under-

taken by the Director of Public Prosecutions are public prosecutions within this rule, and the Director of Public Prosecutions, if called as a witness, is entitled to refuse to disclose the names of his informants, and the nature of the information he has received. Decision of the Queen's Bench Division affirmed. (*Marks v. Beyfus and others*. July, 1890. Ct. of App.) 196.

— See also sub "Practice."

EXCISE LICENCE. See "Licensing Acts."

EXPLOSIVE SUBSTANCE.—*Part of machine adapted for causing explosion—Possession of confederates—46 Vict. c. 3, ss. 3, 4, 9.*—The Explosive Substances Act, 1883 (46 Vict. c. 3), enacts, sect. 9, "The expression 'explosive substance' shall be deemed to include any . . . apparatus, machine, implement, or materials used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; also any part of any such apparatus, machine, or implement." Held, that any part of a vessel which, when filled with an explosive substance, is adapted for causing an explosion (i.e., for causing it to explode so as to be dangerous to life, limb, or property) is an explosive substance within the Act. Sect. 4 provides that any person who makes or has in his possession and under his control any explosive substance under certain circumstances, shall be liable to penal servitude, &c.: Held, that if several persons are connected in a common design to have articles, amounting to an explosive substance within the Act, made for an unlawful purpose, each of the confederacy is responsible in respect of such articles as are in the possession of others connected in the carrying out of their common design. (*Reg. v. Charles and others*. April, 1892. Hawkins, J.) 499.

EXTRADITION.—*Habeas corpus—Extradition Acts, 1870 (33 & 34 Vict. c. 52) and 1873 (36 & 37 Vict. c. 60)—Evidence required to justify commitment under—Embezzlement and fraud as bailee or agent—Misappropriation of money by notary—Larceny Act, 1861 (24 & 25 Vict. c. 96), ss. 75, 76.*—A French subject was arrested in Jersey on a warrant charging him with "embezzlement in France as an agent or bailee." The French diplomatic representative in London thereupon requisitioned the Secretary of State

for his surrender on the ground that he was accused of the crime of "fraud by a bailee" which was an extraditable offence under the Extradition Acts, 1870 and 1873. Sir John Bridge, the police magistrate sitting at Bow-street, committed him to take his trial in France upon a warrant charging him with "embezzlement and fraud as an agent or bailee." The foreign warrant, issued in France, charged him with having embezzled or misappropriated sums of money which had been delivered to him in his capacity of notary. Held, that there was nothing in the technical point that the warrants were not in proper form, and that they differed the one from the other; that the term used in the French warrant, *abus de confiance*, or fraudulent misappropriation of money deposited with the prisoner in his capacity of notary, is a perfectly good offence within the schedule to the Extradition Act, 1870, and also under art. 3 of our Treaty with France, clause No. 18 of the list of extradition crimes. Held also, that all that is necessary is to call the attention of the magistrate to what he is required to do in the case, and that it is sufficient if his attention is drawn to a particular crime under the Act, and it is for the magistrate to inquire whether the evidence laid before him establishes a *prima facie* case of what would be a crime by English law, and such as would justify him in committing the prisoner for trial in an English Court. Held also, that the facts disclosed on the depositions warranted the magistrate in coming to the conclusion that, as regards four of the charges, there was a *prima facie* case under sect. 76 of the Larceny Act, 1861. Held, further, that, under this section, embezzlement in the sense of fraudulent misappropriation may be committed by others than clerks or servants, *i.e.*, by bankers, bailees, or agents; and that there was nothing in the objection that, because the magistrate had committed on all the nineteen charges, and the warrant would not be good as to all of them, it was therefore bad as to all. (*Re Bellen-coutre*. Feb. 1891. Q. B. Div.) 253.

EXTRADITION.—*Habeas corpus*—*Homicide*—*Political offence*—*Reviewal of magistrate's decision*—33 & 34 Vict. c. 52, and 36 & 37 Vict. c. 60 (*Extradition Acts*, 1870 and 1873).—By the Extradition Act, 1870, and by the Extradition Treaty of 1880,

between Great Britain and Switzerland the crimes of murder and manslaughter are, with others, made the subject of extradition, and art. 11 of the treaty incorporates sect. 3 of the Extradition Act, 1870, which excepts from extradition offences of a political character. Angelo Castioni, a fugitive criminal in England, had been committed to prison under the Extradition Acts, 1870 and 1873, by one of the police magistrates at Bow-street, with a view to his extradition to Switzerland in consequence of a requisition by the Swiss Government for his surrender to take his trial in that country on a charge of murder. An application was made for a writ of *habeas corpus* for the release of the prisoner, on the ground that the offence charged was a political offence within the meaning of sect. 3 of the Extradition Act, 1870. Held (adopting the definition of "an offence of a political character" suggested by Stephen, J. in his *History of the Criminal Law of England*, vol. 2, p. 71), that the homicide for which the prisoner's extradition was demanded was committed not only in the course of, but as incidental to and part of a political insurrection; that it was therefore an offence of a political character within the meaning of sect. 3 of the Extradition Act, 1870; and that the prisoner must be discharged. Held also, that the Court was not bound by the decision of the magistrate on the facts before him, but had power to consider the whole matter, and to receive fresh evidence. (*Re Castioni*. Nov. 1890. Q. B. Div.) 225.

—*Obtaining money by false pretences*—*Evidence of guilty knowledge*—*False representation by conduct*—*Application for habeas corpus*.—Bonds, which had been stolen in 1883, were found in 1890 in the possession of the prisoner who, under an assumed name, was dealing with them and selling them to innocent purchasers. Held, that there was evidence of guilty knowledge on which a magistrate in this country might commit the prisoner for trial; and that, assuming that the prisoner knew that the bonds had been stolen, his conduct amounted to a false representation of their genuineness, which was not cured by the fact that, the bonds passing freely from hand to hand, an innocent purchaser would be able to get his money back again. (*Re Pinter*, Dec. 1891. Q. B. Div.) 497.

FALSE PRETENCES.—*Intent — Verdict of jury — Inconsistent findings — Prisoner found guilty of obtaining food and money by false pretences — Recommendation to mercy because of insufficiency of evidence as to intent to defraud.*—Upon an indictment for obtaining food and money by means of false pretences, the false pretence alleged being that the prisoner was a bank clerk and received his salary once a fortnight, the jury found the following verdict: "Guilty of obtaining food and money under false pretences. But whether there was any intent to defraud, the jury consider there is not sufficient evidence, and therefore strongly recommend the prisoner to mercy." The Recorder, therefore, before whom the trial took place, accepted the verdict as being a verdict of guilty upon the authority of *Reg. v. Naylor* (13 L. T. Rep. N. S. 381; 10 Cox C. C. 151; 35 L. J. 61, M. C.; 11 Jur. N. S. 910; 14 W. R. 58), where it was held that the crime of obtaining goods by false pretences is complete, although, at the time when the prisoner made the pretence and obtained the goods, he intended to pay for them when it should be in his power to do so. Upon a case reserved, it was argued in support of the conviction that the verdict was separable, the latter part of it being merely the reasons given by the jury for their recommendation; and that, if it was not separable, inasmuch as the falsity of the pretence alleged must of necessity have been known to the prisoner, the only possible meaning which could be given to the latter portion of the verdict was that the jury considered that at the time the prisoner obtained the food and money he intended at some future time to pay for the food and repay the money: Held, that the verdict was not separable; and that, inasmuch as the latter portion of it negatived the intent to defraud without proof of which the previous portion of the verdict could not have been found, the conviction could not be supported. (*Reg. v. Gray*. April, 1891. C. C. R.) 299.

— *Guilty knowledge.* See sub "Extradition."

— *Indictment.* See sub "Practice."

FALSE TRADE DESCRIPTION. See "Merchandise Marks Act."

FALSIFICATION OF BOOKS.—*Right to trial by jury.* See sub "Justices."

FRESHWATER FISHERIES ACTS. See "Fishery Board."

FIREARM.—*Attempt to discharge.* See sub "Attempt."

FISHERY ACTS.—*Freshwater fishery—Water bailiff—Right to prosecute without the authority of Board of Conservators—Salmon Fisheries Act, 1861 (24 & 25 Vict. c. 109), s. 8—Fisheries Act, 1891 (54 & 55 Vict. c. 37), s. 13.*—The Fisheries Act, 1891, s. 13, provides that the powers conferred by the Fisheries Acts upon any authorities or officers to enforce them shall not limit or take away the power of any other person to take legal proceedings for their enforcement. Held, that under this section a water bailiff can institute proceedings for an offence against the Fisheries Acts without being authorised so to do by the Board of Conservators of the district. *Anderson v. Hamlin* (63 L. T. Rep. N. S. 168; 25 Q. B. Div. 221) is overruled by sect. 13 of the Fisheries Act, 1891. (*Pollock v. Moses*. March, 1893. Q. B. Div.) 737.

— *Oysters — Close time — Taken in foreign waters — Relaid in English waters — Storage — Fisheries (Oyster, Crab, and Lobster) Act, 1877 (40 & 41 Vict. c. 42), s. 4.*—The Fisheries (Oyster Crab, and Lobster) Act, 1877, enacts by sect. 4 that a person shall not sell any oysters known in the trade as "deep sea oysters" between the 15th day of June in any year and the following 4th day of August; or any description of oysters other than those aforesaid between the 14th day of May in any year and the following 4th day of August. Every person who acts in contravention of this section shall be liable to a fine . . . Provided that a person shall not be guilty of an offence under this section if he satisfies the Court that the oysters alleged to have been sold were taken within the waters of some foreign State." The appellants were convicted under the above section for having sold certain oysters on the 4th day of July. The oysters had been imported from France and laid in a creek of the river Medway, where they remained for some four months until the appellants required them for sale: Held, that the conviction was bad, as the oysters were taken within the waters of a foreign State, and were only stored in English waters until they were required for use. (*Robertson and another, apps. v. John-*

son, resp. Nov. 1892. Q. B. Div.) 580.

FISHERY BOARD.—*Person fishing without a licence—Authority of water bailiff to prosecute*—25 & 26 Vict. c. 109, s. 35; 28 & 29 Vict. c. 121, ss. 27, 35; 36 & 37 Vict. c. 71, ss. 36, 62, 65 (*Salmon Fishery Acts, 1861 to 1873*)—41 & 42 Vict. c. 39, ss. 2, 6, 7, 8 (*Freshwater Fisheries Act, 1878*).—Upon the application and complaint of H., a duly appointed water bailiff in the employment of the Avon, Brue, and Parrett Fishery Board, A. was summoned for fishing within the Avon, Brue, and Parret District for trout, with a rod and line, without a licence. At the hearing of the case before the magistrates H. stated that he had received a letter from the clerk to the Fishery Board, directing him to institute the proceedings against A. He did not produce the letter, however, although notice was given to him to do so, and was unable to say whether the Fishery Board had met and passed any resolution authorising the proceedings. The magistrates convicted and fined A., and upon appeal it was held (allowing the appeal and quashing the conviction), that the Fishery Board were the only proper persons to take proceedings against A., and that as H. did not show a distinct authority from the Board to take the proceedings he must be taken to have been unauthorised. (*Anderson, app. v. Hamlin, resp. April, 1890. Q. B. Div.*) 129.

FORM OF CONVICTION. See "Practice."

GAME.—*Sale of game killed abroad—Necessity for excise licence—Game Act, 1831 (1 & 2 Will. 4, c. 32), ss. 2, 4, 18, 23—The Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 14.*—It is not necessary for the seller of game, killed abroad, and imported into this country for sale, to take out an excise licence, though the game be of the same species as, and undistinguishable from, that used in this country. The Game Act, 1831 (1 & 2 Will. 4, c. 32), and the Game Licences Act, 1860 (23 & 24 Vict. c. 90), apply only, and were intended to apply only, to English game. *Guyer v. The Queen on the prosecution of the Field Sports Protection Society* (16 Cox C. C. 657; 60 L. T. Rep. N. S. 824; 24 Q. B. Div. 100; 58 L. J. 81, M. C.) approved. (*Pudney, app. v. Eccles, resp. Oct. 1892. Q. B. Div.*) 594.

GAMING.—*Betting—Advertising as to betting—"Racing Record"—Lottery—Prizes for selecting winning horses—The Betting Acts, 1853 and 1874 (16 & 17 Vict. c. 119, ss. 3, 4; 37 Vict. c. 15, s. 2, sub-sect. 3)—Lottery Act (4 Geo. 4, c. 26, s. 41.*—The respondent, a newspaper proprietor, published weekly a *Racing Record*, which contained information as to races which had been recently run, and as to those which were about to take place; at the end of the book was a coupon, which the purchaser of the book might cut off, and after writing upon it the names of the horses which he thought would win the six races mentioned on it might send to the respondent's office: the respondent offered prizes to the persons who selected six, five, or four winners, the prizes varying in amount according to the number of winners selected. The *Racing Records* were sold principally through newsvendors or stationers, and a few copies only were sold by the respondent over the counter at his office: Held, that the respondent had not committed any offence under either the Betting Act or the Lottery Act. (*Caminada, app. v. Hulton, resp. April, 1891. Q. B. Div.*) 307.

—*Betting—Keeper of beerhouse—Permitting user of room for betting—Betting Houses Act, 1853 (16 & 17 Vict. c. 119, ss. 1 and 3.*—The respondent, the keeper of a public-house, permitted a bookmaker and his clerk on five different days to use the bar and the taproom in the public-house for the purpose of betting upon horse races with persons resorting thereto. Respondent was present on the occasions and permitted such uses. No specific place in the bar or taproom was occupied by the bookmaker or his clerk for that purpose; and they had no interest or property in the premises: Held, that the respondent was liable to be convicted for an offence within the meaning of sect. 3 of the Act for the suppression of Betting Houses, 1853. *Whitehurst v. Fincher* (17 Cox C. C. 70; 62 L. T. Rep. N. S. 433; 54 J. P. 565); *Snow v. Hill* (15 Cox C. C. 737; 52 L. J. 95, M. C.); 14 Q. B. Div. 588) distinguished. (*Hornsby v. Ragget. Oct. 1891. Q. B. Div.*) 428.

—*Betting—Place kept or used for purposes of—Conviction—Stakes not deposited—Preamble of Act—Act for the Suppression of Betting Houses, 1853 (16 & 17 Vict. c. 119), ss. 1 and 3.*—Sect. 1 of the

Act for the Suppression of Betting Houses, 1853 (16 & 17 Vict. c. 119), provides that "no office, room, or other place shall be open, kept, or used for the purposes of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business there of betting with persons resorting thereto, or for the purpose of any money or valuable thing being received by or on behalf of such owner, &c., as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race or other race, fight, game, sport, &c., as aforesaid, and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law." Sect. 3 provides for the penalty for such offence as aforesaid if committed. An information was laid before the magistrates charging the appellant under the above sections with keeping a room (he being the occupier) for the purpose of betting with persons resorting thereto, and the magistrates so found; but it was not shown that the appellant kept the room for the purpose of receiving deposits on bets: Held, that sect. 1 creates two separate and distinct offences: first, keeping a house, office, room, or other place for the purpose of betting with persons resorting thereto; and, secondly, keeping, a house, office, room, or other place for the purpose of receiving deposits for bets. (*Bond*, app. v. *Plump*, resp. Dec. 1893. Q. B. Div.) 749.

— *Betting in a public place*—Instrument of gaming "at any game or pretended game of chance"—*Vagrancy Act*, 1824 (5 Geo. 4, c. 83), s. 4—*Vagrancy Act*, 1873 (36 & 37 Vict. c. 38), s. 3.—In order to convict under the *Vagrancy Act*, 1873 (36 & 37 Vict. c. 38), s. 3, of the offence of "playing or betting by way of wagering or gaming, in a public place, with a coin, card, token, or other article used as an instrument or means of wagering or gaming," it is also necessary to allege and prove that the defen-

dant was guilty of wagering or gaming at some "game or pretended game of chance," which is an essential part of the offence. (*Ridgeway*, app. v. *Farn-dale*, resp. July, 1892. Q. B. Div.) 561.

— *Illegal betting—Betting outside licensed premises—Depositing money inside*—35 & 36 Vict. c. 94, s. 17 (*Licensing Act*, 1872)—"Suffering house to be used"—16 & 17 Vict. c. 119, ss. 1, 3.—The landlord of licensed premises who knowingly allows his house to be used as a place of deposit for money which has been received in betting on a spot outside the area included in the licence cannot be convicted of suffering his house to be used for the purposes of betting. (*Davis*, app. v. *Stephenson*, resp. March, 1890. Q. B. Div.) 73.

— *Illegal betting—Room "open, kept, or used" for betting—Person making bets in bar-room of public-house—The Betting Houses Act*, 1853 (16 & 17 Vict. c. 119), ss. 1, 3.—A person on three successive days went to the bar-room of a public-house for the purpose of betting, and did there bet upon certain horse-races with persons resorting thereto, but he had no interest in the keeping, management, or tenancy of the room, or of any part of the public-house: Held, that as the room had not been opened, kept, or used for the purpose of betting, he had not committed an offence under the 3rd section of the *Betting Houses Act*, 1853, which imposes a penalty upon any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purpose of betting with persons resorting thereto. *Snow v. Hill* (52 L. T. Rep. N. S. 859; 14 Q. B. Div. 588) followed. (*Whitehurst*, app. v. *Fincher*, resp. Jan. 1890. Q. B. Div.) 70.

— *Illegal betting—"Unlawful user of house or place for the purpose of betting with persons resorting thereto"—"Place"*—*Persons making bets in bar-room of public-house—The Betting Houses Act*, 1853 (16 & 17 Vict. c. 119), ss. 1 and 3.—In order to support a conviction under 16 & 17 Vict. c. 119, s. 3, for unlawfully using a house, room, or place for the purpose of betting with persons resorting thereto, it is unnecessary that there should be evidence of such house, room, or place having been opened and kept or used previously to the occasion in ques-

tion for the purpose of such illegal betting as is forbidden by sect. 1; in other words, the illegal user forbidden by sect. 3 is not necessarily of a house, room, or place which is already a common nuisance and a common gaming-house under ss. 1 and 2. It is also immaterial that the principal user of the house, room, or place is for a legitimate object, if in fact it is also used for the prohibited purpose. *Seem*, that user of premises for the purpose of illegal betting for one day only is a sufficient user within the meaning of sect. 3. The term "place" in sect. 3 does not necessarily mean one particular spot, but may include a place extending over a considerable area of ground. Such place need not be bounded by a definite line, but it cannot be of unlimited extent, and is to be confined to the area occupied by the persons congregated together and resorting to it; and such place is further to be limited to a space upon which, if anyone carried on business there as a betting man, he might fairly and reasonably be said to be carrying on such business in the immediate presence of the persons resorting to such space. *Doggett v. Catterns* (34 L. J. 159, C. P.) distinguished. The bar-room of a public-house is a "place" within the meaning of sect. 3, and *semble*, user of a bar-room is user of a "house" for the purposes of the said section: Held, further, that for the purposes of illegal user within the meaning of sect. 3 it is not necessary that the delinquent should remain stationary in the place so used, he may use the place by moving about within its area. *Snow v. Hill* (15 Cox C. C. 737; 52 L. T. Rep. N. S. 859; 14 Q. B. Div. 588; 54 L. J. 95, M. C.) distinguished. (*Reg. v. Preedy and others*. Nov. 1888. C. C. Ct.) 433.

HABEAS CORPUS.—*Appeal*, see sub "Practice." *Application for*, see sub "Evidence." *Political offence*, see sub "Extradition."

HACKNEY CARRIAGE.—*Omnibus*—*Licence*—"Plying for hire"—*No charge for carriage of passengers*—*Towns Police Clauses Act, 1847* (10 & 11 Vict. c. 89), s. 45—*Public Health Act, 1875* (38 & 39 Vict. c. 55), s. 171—*Towns Police Clauses Act, 1889* (52 & 53 Vict. c. 14), s. 4.—Sect. 45 of the Towns Police Clauses Act, 1847, incorporated in the Public Health Act, 1875, provides that if the

proprietor of any carriage permits the same to be used as a hackney carriage plying for hire within a prescribed distance without obtaining a licence he shall be liable to a penalty. By sect. 4 of the Towns Police Clauses Act of 1889, "hackney carriage" is to include an omnibus. Two ordinary omnibuses were run in the following way: It was intimated by several notices upon the omnibuses that the omnibuses were placed at the disposal of the public free of charge, and also notices stating that voluntary contributions to support the omnibuses would be welcomed. There was a conductor on each of the omnibuses to supply change. Many persons using the omnibuses placed money in the boxes, but some did not. The magistrates, upon an information laid before them, held that this was not a "plying for hire" within the meaning of the statute under which the proceedings were taken: Held, that this was an attempt to evade the statute, that there was a "plying for hire" within the meaning of the statute, and that the case must be remitted to the magistrates to rehear and convict. (*Cock, app. v. Mayner*, resp. Dec. 1893. Q. B. Div.) 745.

HIGHWAY.—*Encroachment*—*Conviction*—*Defect*—11 & 12 Vict. c. 43—*Question of title*—*Certiorari*—*Highway Act, 1864* (27 & 28 Vict. c. 101), s. 51.—By sect. 51 of the Highway Act, 1864, if any person shall encroach by making any fence on the side of any carriage-way, within fifteen feet of the centre thereof, he shall on conviction be liable to a penalty. The defendant was convicted under this section. The conviction did not state that the defendant had "encroached" on the highway. A writ of *certiorari* having been granted in chambers in vacation, and a rule *nisi* to quash the conviction having been drawn up, on motion to make such rule absolute: Held, that there was power to amend the conviction, if necessary, under 12 & 13 Vict. c. 45, s. 7, but that *certiorari* having been taken away by sect. 107 of the Highway Act, 1835, which Act by sect. 42 of the Highway Act, 1862, and sect. 2 of the Highway Act, 1864, is to be read as one with the Act of 1864, the omission of the word "encroach" did not render the conviction bad, and that *certiorari* would not lie for such a defect, and therefore the Court would not quash the conviction

on that ground. *Ex parte Bradlaugh* (38 L. T. Rep. N. S. 680; 3 Q. B. Div. 509) considered. The defendant, being charged with an offence under sect. 51 of the Highway Act, 1864, contended that he was the owner of the land on which a fence had been erected, and that it did not form part of the highway, and that the justices had no jurisdiction to adjudicate in the matter, on the ground that title to land came in question: Held, that the justices had jurisdiction, the question for them being whether or not the land in question formed part of the highway. Rule nisi to quash the conviction accordingly discharged. (*Reg. v. Bradley*. March, 1893. Q. B. Div.) 739.

— *Obstruction—Deposit of goods on pavement or part of street—Prohibition against unloading coal—Unloading coke during prohibited hours—Metropolitan Streets Act, 1867* (30 & 31 Vict. c. 134) ss. 6, 15.—The Metropolitan Streets Act, 1867, s. 15, provides that, between the hours of ten o'clock in the morning and six o'clock in the evening, no coal shall be loaded or unloaded on or across any footway within the special limits of that Act: Held, that the above provision does not apply to coke, and that the appellant was therefore wrongly convicted under the section for unloading coke across a footway during the prohibited hours. (*Fletcher, app. v. Fields*, resp. April, 1891. Q. B. Div.) 251.

— *Non-repair*. See sub "Indictment."

— *Nuisance to—Compromise of indictment*. See sub "Compounding Misdemeanour." See also sub "Nuisance."

HOMICIDE. — *Political offence*. See sub "Extradition."

HUSBAND AND WIFE — *Conviction for aggravated assault under sect. 43—Fine 2l. and costs—Order for separation and allowance—Appeal—Matrimonial Causes Act, 1878* (41 Vict. c. 19), s. 4—24 & 25 Vict. c. 100, ss. 42, 43.—In an appeal to the Probate, Divorce, and Admiralty Division against an order of justices made under 41 Vict. c. 19, s. 4, granting a wife separation from her husband and an allowance, the power of the Court is limited to the question whether the justices were right in coming to the conclusion that the future safety of the wife was in peril; and the Court has no power to question in any way the conviction upon which such order was made,

although upon such conviction the justices may have imposed a fine of less than 5l., and thereby prevented the husband from appealing against the conviction to the quarter sessions. (*Lewin v. Lewin*. March, 1891. Prob. Div.) 314.

— *Desertion—Separation deed—Refusal to resume cohabitation—Married women (Maintenance in Case of Desertion) Act, 1886* (49 & 50 Vict. c. 52), s. 1.—A husband cannot "desert" his wife within the meaning of 49 & 50 Vict. c. 52, s. 1, so long as they are living apart under a separation deed. Upon a husband's breach of a covenant in a separation deed to make his wife an allowance, the wife requested him to resume cohabitation: Held, that his refusal of the request was not equivalent to "desertion." (*Reg. v. Leresche and another Justices of Lancashire*. July, 1891. Ct. of App.) 384.

— *Temporary separation for mutual convenience—Refusal on part of husband to take back or maintain his wife—Desertion—Married Women (Maintenance in Case of Desertion) Act, 1886* (49 & 50 Vict. c. 52), s. 1, sub-sect. 1.—During a temporary separation between husband and wife for mutual convenience cohabitation does not cease and the marital relations are not altered. And the husband, who under such circumstances refuses to take his wife back again or to maintain her, may be guilty of desertion within the meaning of the Married Women (Maintenance in Case of Desertion) Act 1886, and liable thereunder. *Reg. v. Leresche* (*ante*, p. 384; 65 L. T. Rep. N. S. 602; (1891) 2 Q. B. 418) distinguished. Decision of the Divisional Court (Day and Lawrance, JJ.), 69 L. T. Rep. N. S. 348, affirmed. (*Chudley v. Chudley*. Nov. 1893. Ct. of App.) 607.

JOINT INDICTMENT. See "Rape."

ILLEGAL ASSOCIATION.—*Property in goods of*. See "Practice."

INDECENT ADVERTISEMENT ACT. See "Justices."

INDECENT ASSAULT.—*Indictment under Criminal Law Amendment Act*. See sub "Practice."

INDICTABLE OFFENCE.—*Summary trial of adult—Appeal*. See sub "Justices."

INDICTMENT.—*Breach of statutory duty—Specific remedy provided by statute*

imposing duty—Preparation of voters' lists by overseers—Non-compliance with Registration Acts—Liability of overseers to indictment at common law—Motion to quash indictment—Reform Act, 1832 (2 & 3 Will. 4, c. 45)—Registration Act, 1843 (6 Vict. c. 18), ss. 13, 51, and 97.—An indictment will not lie against an overseer for wilful breaches of the duties imposed upon him by the Registration Act of 1843, in preparing and publishing voters' lists, inasmuch as for every such breach of duty—the duties being new duties created or re-created by the statute—a special tribunal is created by sect. 51 of the Act, and a penal action given by sect. 97, which excludes the remedy by indictment. Sects. 13-19 of the Registration Act, 1843, prescribe the duties of overseers in the preparation and publication of the lists of persons entitled to vote in the election of members of Parliament, and these sections contain no general prohibitory clause. Sect. 51 gives the revising barrister power to fine overseers who, in making out such voters' lists, "shall wilfully and without any reasonable cause omit the name of any person duly qualified to be inserted in such list, or who shall wilfully and without reasonable cause insert in such list the name of any person not duly qualified," or who (after specifying all the various offences which may be committed by overseers) shall be wilfully guilty of any other breach of duty in the execution of this Act; and sect. 97 gives the party aggrieved the right to bring a penal action against the overseer for "every wilful misfeasance, or wilful act of commission or omission contrary to the Act." The Reform Act of 1832 for the first time cast upon the overseer duties in accordance with the register of voters, and sect. 38 of that Act was substantially the same as sect. 13 of the present Act, but that and the other sections of the Act of 1832, relating to such duties, were repealed by the Registration Act of 1843. Held, by Charles, J., that, upon the true construction of these sections, the duties imposed on overseers with regard to voters by sect. 13 of the Act of 1843 were in fact new duties created or re-created by the statute, and that the specific remedy consisting of the power given to the revising barrister to fine, and of the right of the aggrieved party to bring a penal action, provided by sects. 51 and 97 respectively, for all wil-

ful breaches of the duties imposed by the Act on overseers, excluded the remedy by indictment, and that therefore, for any such wilful breach of duty, an overseer cannot be indicted. The defendant, being an overseer of the poor, and as such overseer having the duty cast upon him by the Registration Act of 1843 of preparing voters' lists for the purpose of parliamentary registration, was indicted for having unlawfully and wilfully omitted from such list the name of a person who was qualified as a voter, and for having unlawfully and wilfully inserted in such list the names of persons who were not qualified, and for having attempted to prevent the course of justice by taking steps to place false evidence before the revising barrister in tampering with the list of voters, and in tampering with the register itself. Upon a motion to quash the indictment on the ground that it disclosed no indictable offence: Held, that the indictment contained no indictable offence, and ought to be quashed; and that the objection that the indictment disclosed no indictable offence could properly be taken by a motion to quash the indictment. (*Reg. v. Hall*. Feb. 1891. C.C. Ct.) 278.

INDICTMENT. — *Non-repair of highway—Liability to repair ratione tenuræ—Indictment of owner of lands charged with repair—Continuance of liability during existence of turnpike trust—Destruction of subject-matter of liability by trustees—Liability to repair altered road.*—An indictment for the non-repair of a highway will not lie against the owner of lands the tenure of which carries with it the burden of repairing the highway, the occupier of such lands being the only person against whom such an indictment will lie. Where a highway becomes repairable by trustees under a Turnpike Act the common law liability to repair such highway (whether such liability rests with the inhabitants of the parish in which the highway is situate or with an individual *ratione tenuræ*) continues, in the absence of any enactment to the contrary, so long as the highway remains similar in character to what it was up to the time of the passing of the Turnpike Act. If, however, the highway is so altered in character by the trustees, under the powers conferred upon them by the Turnpike Act, as to destroy what was the old highway, the

common law liability is put an end to by operation of law. (*Reg. v. Barker*. May, 1890. C. C. R.) 26.

— *Compromise*. See sub "Compounding Misdemeanours."

— *Corrupt practices*. See sub "Practice."

— *False pretences*. See sub "Practice."

— *Joint indictment*. See sub "Evidence and Rape."

— *Libel—Material averments*. See sub "Certiorari."

— *Perjury*. See sub "Perjury."

— *Property in goods—Illegal association*. See sub "Practice."

— *Removal into Queen's Bench Division—Costs*. See sub "Practice."

INFANT.—*Capacity for committing felony—Presumption of law—Indictment for unlawfully and carnally knowing girl under thirteen—Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 4*. The Criminal Law Amendment Act, 1885, has not altered the common law that an infant under the age of fourteen years is to be presumed to be *doli incapax*, and cannot therefore be convicted of felony: Held, therefore, that a conviction of a lad under that age for unlawfully and carnally knowing a girl under the age of thirteen could not be sustained. (*Reg. v. Waite*. Aug. 1892.) 554.

— *Costs of subpœna*. See sub "Practice."

— *Parent deprived of possession of child under fourteen by fraud—Fraud practised on mother and not on child—24 & 25 Vict. c. 100, s. 56*.—In order to support a conviction under 24 & 25 Vict. c. 100, s. 56, for feloniously and unlawfully by fraud taking away a child under the age of fourteen years with intent thereby to deprive the father of such child of its possession, it is not necessary to prove that the fraud, by means of which possession of the child was obtained, was practised upon the child itself. Where, therefore, a prisoner had been convicted upon an indictment which charged her with such offence, it having been proved that possession of the child, which was of the age of eleven weeks, had been obtained by means of a fraud practised upon its mother: Held, that the prisoner had been rightly convicted. *Dictum* of Smith, J. in *Reg. v. Barrett* (15 Cox C. C. 658) dissented from. (*Reg. v. Bellis*. June, 1893. C. C. R.) 660.

INFORMATION.—*Two or more offences*. See sub "Practice."

INLAND REVENUE ACTS.—*Trial by jury*. See sub "Justices."

INTIMIDATION.—*Exception in respect of seamen—Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), ss. 7-16*.—Sect. 16 of the Conspiracy and Protection of Property Act, 1875, which provides that nothing in the Act shall apply to seamen, does not exempt a person who is not a seaman from being charged with, and being liable to punishment under the Act for, an offence committed by him against a seaman. (*Kennedy v. Cowie*. April, 1891. Q. B. Div.) 320.

— *Meaning of term—Trade union—Threat to cause strike unless employer ceases to employ workmen not members—No violence to person or property threatened—Practice—Evidence of defendant—Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 3; s. 7, sub-sect. 1*.—The evidence of the defendant in proceeding under sect. 7 of the Conspiracy and Protection of Property Act, 1875, is inadmissible. Where, therefore, evidence which had been given by a defendant upon a charge of intimidation under the section formed part of the grounds upon which he was convicted, the conviction was quashed. In order to support a charge of intimidation under sect. 7 of the Conspiracy and Protection of Property Act, 1875, it is not sufficient to prove the use of threats which merely caused the person threatened to fear that he would lose the employment he was in at the time the threats were made use of, and that he would be unable to obtain any employment subsequently. Nor is it sufficient to prove acts of coercion, not unlawful in themselves, the effect of which was to cause an employer's workmen to leave their employment, without giving the notice required by their contracts with their employer. *Quære*, whether in order to support such a charge the intimidation must not amount at least to such intimidation as would have been within the repealed enactment contained in sub-sect. 2 of sect. 1 of the Trade Union Act, 1871, namely, intimidation which would justify a justice of the peace on complaint made to him to bind over the person intimidating to keep the peace. *Reg. v. Druitt* (10 Cox C. C. 592) and *Reg. v. Bunn* (12 Cox C. C.

316) dissented from. (*Connor v. Kent*; *Gibson v. Lawson*; *Curran v. Treleaven*. April, 1891. Q. B. Div.) 354.

JUDICIAL TRIBUNAL.—*Arbitrators*. See sub "Evidence."

JUSTICE.—*Attempt to prevent course of*. See sub "Evidence."

JUSTICES OF THE PEACE.—*Appeal—Special case—Service of application to state case—Summary Jurisdiction Act, 1879* (42 & 43 Vict. c. 49), s. 33.—*Summary Jurisdiction Rules, 1886, r. 18*.—A Court of summary jurisdiction, composed of five justices, having convicted the appellant, an application in writing was made to two of the justices to state a special case, and a copy of such application was left with the clerk of the Court: Held, that the application to the two justices was not an application to the Court within the meaning of the Summary Jurisdiction Act, 1879, s. 33, and the Summary Jurisdiction Rules, 1886, r. 18; and that the Court had therefore no jurisdiction to hear a case stated by the two justices to whom the application had been made. (*Westmore, app. v. Paine*, resp. Jan. 1891. Q. B. Div.) 244.

— *Appeal from summary conviction—Recognisance entered into too late—Costs of appeal—Appellant's liability for—Summary Jurisdiction Act, 1879* (42 & 43 Vict. c. 49), s. 31, sub-sects. 2 and 3.—An appeal from a summary conviction was dismissed with costs by the Court of Quarter Sessions on the ground that the Court had no jurisdiction to entertain it, as the appellant had not entered into a recognisance within three days after the day on which he gave notice of appeal, as required by sect. 31, sub-sect. (3) of the Summary Jurisdiction Act, 1879. On the refusal of the appellant to pay the costs of the appeal as ordered, the Court of Quarter Sessions directed that his recognisance should be estreated: Held, that the justices were right in estreating the recognisance on non-payment of the costs of the appeal. (*Reg. v. The Justices of Glamorganshire*. April, 1890. Q. B. Div.) 45.

— *Appeal—Criminal cause*. See sub "Practice."

— *Dismissal of complaint*. See sub "Assault."

— *Disqualification of—Bias—Salmon Fishery Act, 1865* (28 & 29 Vict. c. 121),

ss. 27, 61.—Under sect. 27, sub-sect. 4, of the Salmon Fishery Act, 1865, the Board of Conservators of a fishery district have power within their district to do certain things, and among them they have power to take legal proceedings against persons violating the provisions of the Salmon Fishery Acts, 1861 and 1865, and by sect. 61 of the Act of 1865 it is provided for as follows: "No justice of the peace shall be disqualified from hearing any case arising under the Salmon Fishery Acts, 1861, 1865, or either of them, by reason of his being a conservator, or a member of a board of conservators;" and the same section also provides that "no justice shall be entitled to hear any case in respect of any offence committed on his own land." A justice of the peace was present at a meeting of the Board of Conservators of which he was a member, and at the meeting the Board unanimously passed a resolution to take legal proceedings against a certain person for the violation of certain provisions of the Salmon Fishery Acts. At this meeting of the Board of Conservators the justice in question was present, but took no further part than by voting for the resolutions directing a prosecution; his name appeared as having been present at the meeting when the resolution was passed authorising the prosecution to be instituted. The justice in question subsequently sat with other justices to hear the charge, and no objection was made to the justice hearing the charge. The justices who tried the case were not riparian owners of the land in question. The justices convicted: Held, that the conviction must be quashed. (*Reg. v. Col. Henley and others, Justices, &c., and Hutchins*. Jan. 1892. Q. B. Div. 518.

— See also sub "Practice."

— *Jurisdiction—Breach of law—Refusal of justices to convict—Driving stage coach without a licence—Application by employer of driver for licence—Personal application of driver required by licensing committee—Refusal of licence where application made in absence of driver—Validity of committee's requirement—Llandudno Improvement Act, 1854—Town Police Causes Act, 1847* 10 & 11 Vict. c. 89), s. 47.—An information was laid by an inspector against the defendant for unlawfully driving a stage coach without having obtained a licence from the Improvement Commis-

sioners of Llandudno. Defendant was in the employ of a carriage proprietor as a stage coach driver. The licensing committee appointed by the Commissioners passed a resolution requiring drivers who desired their licences renewed to apply to the committee in person. The manager of the said carriage proprietor applied to the licensing committee for a renewal of, amongst others, the defendant's licence. The committee refused to consider any application unless the applicants attended personally. No complaint was made against the defendant personally. The defendant subsequently acted as a driver without a licence. The justices held that the defendant had failed to obtain a licence in consequence of the committee refusing to hear his application, although they had no complaint against him, and that under those circumstances the charge was trivial, and they accordingly dismissed it. The inspector who preferred the charge appealed: Held, that the justices were wrong and should have convicted, for there had been a breach of the law, and that the Commissioners had a right to insist on the personal attendance of the applicants, the possession of a driver's licence being a personal privilege. Case remitted. (*Banton v. Davies*. Dec. 1891. Q. B. Div.) 469.

— *Jurisdiction — Disorderly houses —*

Summary proceedings — Warrant for arrest of person accused — 25 Geo. 2, c. 36, ss. 5, 6, and 7—58 Geo. 3, c. 70, s. 7—*Summary Jurisdiction Act, 1848* (11 & 12 Vict. c. 43), s. 2—*Criminal Law Amendment Act 1885* (48 & 49 Vict. c. 69), s. 13. —The provisions contained in sects. 5 & 6 of the Act of 25 Geo. 2, c. 36, which provide that a warrant shall be issued for the arrest of a person accused, on notice given by two inhabitants to a constable, of keeping a disorderly house, apply to a prosecution by summary proceedings, under sect. 13 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), of a person accused of keeping a brothel; and, therefore, in such a case, if an application for a warrant is made in accordance with 52 Geo. 2, c. 36, a magistrate is bound to grant it. (*Reg. v. Newton*. April, 1892. Q. B. Div.) 530.

— *Jurisdiction — Illegal issue of summons — Appearance by accused — Objection to jurisdiction — Waiver of illegality — Conviction — Limit of time — Jervis's Act*

(11 & 12 Vict. c. 43, s. 1)—*Sale of Food and Drugs Acts, 1875 and 1879* (38 & 39 Vict. c. 63, ss. 6, 20; 42 & 43 Vict. c. 30, s. 10).—An information having been laid before two justices against the appellant under the Sale of Food and Drugs Acts, 1875 and 1879, with reference to the sale of a quantity of new milk on the 20th day of September, no summons was issued by such justices, but subsequently a summons returnable upon the 23rd day of October was issued by a justice who had not heard the information. The appellant appeared and objected that the justices had no jurisdiction, as the summons had been illegally issued, but the objection was overruled, upon the ground that, as the appellant had appeared, it was immaterial that the summons had not been properly issued: Held, that the summons was not legally issued, and that the appearance of the appellant before the justices did not give them jurisdiction, as the Sale of Food and Drugs Act, 1879 (42 & 43 Vict. c. 30), s. 10, requires that the summons shall be served within twenty-eight days from the time of the purchase of the article in question, and the appellant had not appeared until more than twenty-eight days had expired since the alleged offence had been committed. (*Dixon, app. v. Wells*, resp. May, Q. B. Div.) 48.

— *Jurisdiction — Right to claim trial by jury — Person summoned before court of summary jurisdiction — Fine of 100l. imposed by statute for offence — Brewer for sale — Offence of making untrue entry in book — Right of person charged with such offence to claim trial by jury — Inland Revenue Act, 1880* (43 & 44 Vict. c. 20), s. 20—*Summary Jurisdiction Act, 1879* (42 & 43 Vict. c. 49), ss. 17, 53.—Sect. 17 of the Summary Jurisdiction Act, 1879, provides that a person charged before a Court of summary jurisdiction "with an offence in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months," may claim to be tried by a jury; and sect. 53 provides that where the sum adjudged by conviction under any of the statutes relating to the Revenue to be paid exceeds 50l., the Court may, in default of sufficient distress, imprison for a term exceeding three months, but not exceeding six months. Sect. 20 of the Inland Revenue Act, 1880, imposes a fine of 100l. for

every contravention of the section, which provides that a brewer for sale shall (*inter alia*) enter in a book kept for that purpose the quantity of malt which he intends to use in his next brewing, and shall not make in such book any entry which is untrue: Held, that a person who is summoned under sect. 20 of the Inland Revenue Act, 1880, before a court of summary jurisdiction, for making in this book an untrue entry, has not the right, under sect. 17 of the Summary Jurisdiction Act, 1879, to demand to be tried by a jury, but that such person may be tried by the justices without a jury. (*Carle*, app. v. *Elkington*, resp. May, 1892. Q. B. Div.) 557.

JUSTICES OF THE PEACE.—Jurisdiction

—*Statutory direction to provide and fix weights and scales in baker's shop* — *Absence of penalty* — *Proceedings for breach not cognisable in Court of summary jurisdiction*—3 Geo. 4, c. cvi., s. 8—6 & 7 Will. 4, c. 37, s. 6.—Sect. 8 of 3 Geo. 4, c. cvi. (and therefore sect. 6 of 6 & 7 Will. 4, c. 37, which is in the same terms), though directing that every baker, &c., shall fix in his shop proper weights and scales, &c., does not provide a penalty for the breach of this duty, which therefore does not constitute an offence cognisable by a Court of summary jurisdiction. (*Reg. v. Horace Smith, Esq., and the Aerated Bread Company*. Jan. 1894. Q. B. Div.) 735.

—*Jurisdiction—Summons for libel—Power to adjourn when civil proceedings pending between other parties arising out of same matter—What is exercise of discretion.*—A magistrate cannot consider judicially, as ground for adjourning a summons for libel, pending civil proceedings between different parties for a different libel, though arising out of the same matters. (*Reg. v. Evans and others*. March, 1890. Q. B. Div.) 81.

—*Jurisdiction—Two informations—Conviction on first information upon evidence of second*—20 & 21 Vict. c. 43—*Indecent Advertisements Act, 1889* (52 & 53 Vict. c. 18), ss. 3 and 4—11 & 12 Vict. c. 43, s. 10.—Justices having heard an information preferred against the appellant under sect. 4 of the Indecent Advertisements Act, 1889, did not acquit or convict the appellant, but proceeded to hear a second information against the appellant under sect. 3 of the Indecent Advertisements Act, 1889, and having

heard the evidence against the appellant upon the second information under sect. 3, they convicted the appellant on the first information under sect. 4: Held, that the magistrates, having heard evidence upon one information, and reserving their decision until they heard the evidence upon the second information, and then convicting on the first, their conviction could not be supported. That each case must stand upon its own merits, and must be decided upon the evidence given in it alone. (*Hamilton v. Walker*. May, 1892. Q. B. Div.) 539.

—*Jurisdiction.* See also *sub* "Practice," and *sub* "Sale of Food and Drugs Acts," "Highway," "Bastardy," "Merchandise Marks Act," and "Weights and Measures."

—*Mandamus—Declining jurisdiction*

—*One summons disposed of—Refusal to hear application for second summons—Continuing offence.*—A company were bound under an Act of Parliament to construct a certain reservoir by a certain date, the 26th Nov. 1875, and were liable to a penalty for every week during which it should remain uncompleted after that date. A summons was taken out by the present prosecutor in 1880 to recover penalties under the Act, which summons was dismissed by the justices on the ground that the alleged offence had been completed more than six months before the date of the summons, and that the claim was barred by sect. 11 of 11 & 12 Vict. c. 43. In May, 1890, the reservoir being still uncompleted, an application was made by the prosecutor for another summons for penalties, the prosecutor alleging that the offence was a continuing offence; but the justices refused to hear this application, on the ground that the matter had been already dealt with, and that they had no jurisdiction: Held, that, as the justices in refusing to hear the application had in effect declined jurisdiction, a *mandamus* ought to go directing them to hear and determine whether, under the circumstances, a summons ought now to issue. (*Reg. v. Colonel Byrde and others, Justices, and the Pontypool Gas Company*. Nov. 1890. Q. B. Div.) 187.

—*Police rate.* See *sub* "County Council."

—*Practice—Appeal to quarter sessions—Conditions and regulations of appeal—Deposit in lieu of recognisance—Proper Court to fix deposit—Court of sum-*

mary jurisdiction before whom appellant appears to enter into recognisance—*Meaning of—Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31, sub-sects. 2, 3.*—By sect. 31, sub-sect. 2, of the Summary Jurisdiction Act, 1879, an appellant, appealing to a Court of quarter sessions from a decision of a Court of summary jurisdiction, is required to give within seven days after the decision a notice of appeal in writing, stating the general grounds of appeal; and by sub-sect. 3 the appellant, within three days after notice of appeal, must enter into a recognisance before a Court of summary jurisdiction, or the appellant may, if “the court of summary jurisdiction before whom the appellant appears to enter into a recognisance” think it expedient, give such security by way of deposit as “that court deem sufficient.” On the same day on which the decision of a Court of summary jurisdiction was given, the appellant gave a verbal notice of appeal, and the Court allowed the appellant to make a deposit in lieu of a recognisance, and fixed the amount of such deposit, and three days afterwards the appellant gave a written notice of appeal. The Court of Quarter Sessions declined to hear the appeal on the ground that the regulations of sect. 31 had not been complied with: Held, that the Court which had decided the case, not having had the notice of appeal and the grounds of appeal before it, was not the Court of summary jurisdiction which had power to take the recognisance or fix the deposit within sub-sect. 3; and that, as the wrong Court had fixed the deposit, the conditions and regulations of the section had not been complied with by the appellant, and that, therefore, the quarter sessions were right in refusing to hear the appeal. (*Reg. v. The Justices of Anglesey*. May, 1892. Q. B. Div.) 563.

— *Practice—Appeal to quarter sessions against conviction—Notice of appeal addressed to clerk of justices—Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31, sub-sect. 2.*—A rule nisi for a mandamus was obtained calling upon the magistrates at quarter sessions to hear an appeal against a conviction. The magistrate at quarter sessions having refused to hear the appeal because the notice of appeal was addressed to the clerk of the Court of summary jurisdiction, and not to the

justices from whose decision the appeal was brought: Held, that the notice was sufficient, and need not be addressed to the justices from whose decision the appeal was brought. (*Reg. v. The Justices of Essex; Ex parte Stark*. Feb. 1892. Q. B. Div.) 521.

— *Practice—Summary jurisdiction—Summary trial of adult with consent—Conviction—Appeal to quarter sessions—Right of convicted person to appeal—Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), ss. 12, 19.*—Where an adult person, who is charged before a Court of summary jurisdiction with an indictable offence, consents to be dealt with summarily under sect. 12 of the Summary Jurisdiction Act, 1879, and is so dealt with and convicted, then such person has no right of appeal, under sect. 19 of the Act, to a Court of quarter sessions, inasmuch as sect. 19 only gives a right of appeal in case of a conviction “in pursuance of any Act, whether past or future,” which does not include a conviction under this Act itself. (*Reg. v. Justices of London; Ex parte Lambert*. Feb. 1892. Q. B. Div.) 526.

— *Special case—Appeal—Question of law.* See sub “Practice.”

LARCENY.—*Letters in course of transmission through post—Inducing postman to hand over letters addressed to other persons—Accessory before the fact of theft by postman—24 & 25 Vict. c. 94, s. 1.*—A person who without authority induces a servant of the Postmaster-General to hand over to him and so receives letters addressed to persons other than himself, which came into the possession of such servant in the course of their transmission through the post, is guilty of larceny of the letters so received, either at common law as a principal in the commission of the larceny by the servant, or, under 24 & 25 Vict. c. 94, s. 1, as an accessory before the fact of such larceny. (*Reg. v. James*. Feb. 1890. C. C. R.) 24.

— *By bailee.* See sub “Extradition.”

— *By trick—Purse trick—Pretence of dropping several shillings into purse—Shilling obtained in exchange for purse and its supposed contents.*—In support of an indictment for the larceny of three shillings and sixpence it was proved that the prisoner had obtained possession of a shilling, and then of a half-crown, from the prosecutor by means of what

is known as the purse trick. That is to say, he had induced the prosecutor to give him a shilling for a purse, into which he had dropped three coins, by first showing the prosecutor three shillings, and then making it appear as if he had dropped them into the purse. In the same way he had induced the prosecutor to give him a half-crown for a purse into which he had made it appear that he had dropped two half-crowns. Having been convicted of obtaining the money by means of a trick, upon a case reserved for the opinion of this Court: Held, that the prosecutor having parted with the property in his shilling and half-crown in exchange for the purses and their contents, the prisoner had been guilty, if at all, of obtaining the coins by means of a false pretence, and could not be convicted of larceny. (*Reg. v. Solomons*. May, 1890. C. C. R.) 93.

LARCENY.—*By trick*—*Sale of horse*—*Payment of deposit*—*Agreement to pay balance of purchase-money on delivery of horse*—*Deposit received with intention not to deliver horse*.—In support of an indictment charging a prisoner with the larceny of the sum of 8*l.* it was proved that he had at a fair agreed to sell to the prosecutor a horse for 23*l.*, that the prosecutor had paid the prisoner the sum of 8*l.*, and had executed an agreement to pay the balance of 15*l.* upon delivery of the horse. At the time the 8*l.* was paid the prosecutor never expected its return, but expected to have the horse delivered to him. The horse not having been delivered, however, and the circumstances attending its removal from the fair by the prisoner being such as to satisfy the jury that the prisoner never intended when he received the 8*l.* to deliver the horse to the prosecutor, the prisoner was found guilty of the larceny of that sum. Upon a case reserved for the consideration of this Court: Held, that the prosecutor had under the circumstances parted with the possession only of the money and not with the property in it, and that therefore the prisoner had been rightly convicted of its larceny. (*Reg. v. Russett*. May, 1892. C. C. R.) 534.

— *Growing grass*—*Abandonment of possession by trespasser*.—A trespasser entered the close of another and cut growing grass, and three days subsequently returned and carried it away for his own use. For these acts he was indicted for larceny at common law,

tried, and convicted. Upon a case reserved at the trial: Held, by the Court for Crown Cases Reserved (*Palles, C.B. dissente*), that the conviction was good. *Reg. v. Townley* (12 Cox C. C. 59; 24 L. T. Rep. N. S. 517; L. Rep. 1 C. C. R. 315; 40 L. J. 144, M. C.; 19 W. R. 725) and *Reg. v. Petch* (14 Cox C. C. 116; 33 L. T. Rep. N. S. 788) distinguished. (*Reg. v. Edward Foley*. Nov. 1889. C. C. R. Ir.) 142.

— *Security for the payment of money*—*Bill of exchange complete except as to signature of drawer*—*Acceptance of bill of exchange*—*Bill handed to prisoner to get discounted subject to directions in writing*—*Broker or agent*—*Conversion contrary to directions in writing of sum obtained by discounting bill*—24 & 25 Vict. c. 96, s. 75—45 & 46 Vict. c. 61, s. 18.—A document which is a complete bill of exchange in all respects except that of the signature of the drawer is, when in the hands of the intended drawer, a valuable security; and is also, by virtue of sect. 18 of the Bills of Exchange Act 1882, a bill of exchange. Such a document is therefore a security for the payment of money within 24 & 25 Vict. c. 96, s. 75. Whether a person intrusted with a security for the payment of money with a direction in writing as to its application, or as to the application of the proceeds thereof, was so intrusted as a broker or agent within the meaning of 24 & 25 Vict. c. 96, s. 75, is a question of fact for the jury; and the mere fact that such a person had an interest in the transaction greater than that of a mere agent would not deprive him of his capacity as agent. (*Reg. v. Bowerman*. Nov. 1890. C. C. R.) 151.

LIBEL.—*Appeal*. See sub "Practice."

— *Averments in indictment*. See sub "Certiorari."

— *Justices' jurisdiction*—*Adjournment*. See sub "Justices."

LICENSING ACTS.—*Death of licence-holder*—*Minority of heir*—35 & 36 Vict. c. 94, s. 3.—It is not necessary that the heir of a licensed person who dies before the expiration of his licence should have attained the age of twenty-one years before he can sell intoxicating liquors and carry on the business of the licensed house until the next special sessions without incurring the penalties imposed by sect. 3 of the Licensing Act, 1872.

(*Rose (app.) v. Frogley (resp.)*. May, 1893. Q. B. Div.) 685.

— *"Illegally dealing in intoxicating liquor"*—*Buyer and seller of intoxicating liquor*—*Conviction of buyer*—*Licensing Act, 1874* (37 & 38 Vict. c. 49), s. 17.—The respondent was found on unlicensed premises to be buying and consuming intoxicating liquor, and was summoned before the stipendiary magistrate of Cardiff for being found in a house in that town for the purpose of "illegally dealing in intoxicating liquor," contrary to the provisions of sect. 17 of the Licensing Act, 1874. The magistrate refused to convict the respondent for being a buyer, holding that "dealing" could only be by the seller: Held, that the words "illegally dealing" in intoxicating liquor must be read to include both buyer and seller, and therefore the magistrate must convict the respondent. (*McKensie, app. v. Day, resp.* Jan., 1893. Q. B. Div.) 604.

— *Proprietary club*—"Sale" of liquor by proprietor to member—*Excise Acts* (6 Geo. 4, c. 81, s. 26; 4 & 5 Will. 4, c. 85, s. 17; 23 Vict. c. 27, s. 19).—A proprietary club was carried on by a limited company. At the beginning of the book of rules it was stated that, the club being proprietary, neither the committee nor members incur any liability beyond their annual subscription of two guineas, all such liability devolving on the company. Under the rules the company had the sole management of the club, both as to its property and its funds, and all the drink and liquor at the club belonged to the company and not to the members, and all profit from sales of drink and other articles and from the carrying on of the club went to the company. The club was under the management of a committee of members in whom was vested the election of members. Under one of the rules the appellant, who was not a shareholder in the company, was elected by a sub-committee, as honorary member pending inquiries, and this rule stated that honorary members so elected should have, pending their election by the committee, the same privileges as members. The appellant paid his subscription, and was then, while honorary member, supplied with beer, wine, and spirits, for which he paid, and which he consumed on the premises. The appellant was afterwards rejected as a member and his

subscription returned. The company had no licence for the sale by retail of liquors to be consumed on the premises or otherwise. Held, that, upon the above facts, there was a sale by the company by retail of the beer, wine, and spirits supplied to the appellant, within the meaning of the Licensing Acts, and that a licence to the company to sell such liquors by retail was necessary. (*Bowyer, Officer of Inland Revenue, app. v. The Percy Supper Club Limited, resps.* June, 1893. Q. B. Div.) 669.

— *Sale by retail of beer to be consumed off the premises*—*Excise licence*—*Sale of beer otherwise than in casks or reputed quart bottles*—*Sufficiency of quantity sold at same time*—*Licensing Act, 1872* (35 & 36 Vict. c. 94), ss. 3 and 14—*Inland Revenue Act, 1863* (26 & 27 Vict. c. 33), s. 1—*Beerhouse Act, 1834* (4 & 5 Will. 4, c. 85), s. 19—6 Geo. 4, c. 81, s. 2.—The holder of an excise licence under 6 Geo. 4, c. 81, s. 2, may sell beer in casks containing not less than four-and-a-half gallons or in not less quantity than two dozen reputed quart bottles at one time. A holder of a licence under this Act sold beer in pint and half-pint bottles, but the quantity so sold at one time was not less than that contained in a cask of four-and-a-half gallons or in two dozen reputed quart bottles. He was convicted under sect. 3 of the Licensing Act, 1872, of having sold beer by retail without a licence. On appeal—Held, that the quantity sold at one time was the test of a sale of beer by retail, and that therefore the conviction was wrong. (*Fairclough v. Roberts.* Feb., 1890. Q. B. Div.) 101.

— *Sale of intoxicating liquor*—*Marked measure*—*Sale in mug holding specific quantity*—*Demand by customer for specific quantity*—*No Imperial standard equivalent*—*Licensing Act, 1872* (35 & 36 Vict. c. 94), s. 8.—It is provided by the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 8, that "every person shall sell all intoxicating liquor which is sold by retail, and not in cask or bottle, and is not sold in a quantity less than half-a-pint, in measures marked according to the Imperial standards. Every person who acts in contravention of this section shall be liable to a penalty. . . ." The appellant, a publican, at the request of a customer, served him with a "blue" of beer; a "blue" being well known in the locality as being a vessel of a parti-

cular shape and containing about a third of a quart. The appellant drew the beer direct into the "blue" and not into a measure marked according to the Imperial standard. The appellant was convicted under the above section. On his behalf it was contended that, as the customer had asked for beer in a quantity for which there was no Imperial standard measure, the appellant was not guilty of an offence under sect. 8: Held, that, as the beer was not sold in a measure marked as required by the statute, the conviction was right. (*Payne*, app. v. *Thomas*, resp. Oct., 1890. Q. B. Div.) 212.

LICENSING ACTS.—*Sale of liquor during prohibited hours—Bonâ fide traveller, who is—Licensing Act, 1874 (37 & 38 Vict. c. 49), ss. 9, 10.*—The proper test of a person being a *bonâ fide* traveller within the meaning of sect. 10 of the Licensing Act, 1874, is whether the main object of his journey was either for business or pleasure, or whether it was undertaken with the purpose of obtaining drink. The appellant, a licensed victualler at Little Houghton, a village three and a half miles from Northampton, was convicted by the magistrates of Northampton under sect. 9 of the Licensing Act, 1874, of selling intoxicating liquor during prohibited hours on Sunday to persons who were not *bonâ fide* travellers within sect. 10. The evidence showed that the back yard of the defendant's premises was fitted up with tables and benches, and that two extra waiters were employed to attend to the Sunday customers. There were 131 persons on the premises, most of whom were known to the defendant as artisans from Northampton. They were served only once with beer, and with no more than a pint each. After being served they departed in an orderly manner, and nearly all walked back to Northampton without going further. The defendant before serving them asked them where they came from and where they lodged the preceding night: Held (Cave, J. dissenting), that there was sufficient evidence on which the magistrates might find, as they did, that the main object of the purchasers in walking from Northampton to Little Houghton was to obtain drink, and that they were therefore not *bonâ fide* travellers within the meaning of sect. 10: Held also, that there was sufficient evidence to justify

the magistrates in finding that the defendant did not truly believe them to be *bonâ fide* travellers. (*Payne v. Thomas*, Feb., 1893. Q. B. Div.) 615.

LOCAL GOVERNMENT ACT, 1888.—*Police rates.* See sub "County Council."

LOTTERY.—See "Gaming."

MANDAMUS.—*Justices declining jurisdiction.* See sub "Justices" and sub "Practice."

MANSLAUGHTER.—*Moral obligation as legal duty—Neglect of legal duty—Duty to assist sick and helpless person—Neglect to supply food and medicine.*—The moral obligation to assist a sick and helpless person imposes a legal duty not to withhold such assistance, and consequently a person who wilfully neglects to enable a sick person to obtain such food and medicine as may be necessary to sustain life, is guilty of manslaughter. A woman who lived alone with her sick and helpless aunt neglected to give to her aunt such assistance as was necessary in order to enable her to obtain food and medical attendance; and neglected also to inform persons able and willing to give assistance of her aunt's condition. It having been found as a fact that her negligence accelerated her aunt's death: Held that she was properly convicted of manslaughter. (*Reg. v. Instan*, Feb., 1883. C. C. R.) 602.

— *Plea of autrefois convict.* See "Practice."

MARGARINE ACT, 1887.—*"Exposed for sale by retail"—Meaning of "exposed for sale"—Margarine placed out of purchaser's sight—50 & 51 Vict. c. 29, s. 6.*—A parcel of margarine was kept by a retail dealer in the ordinary course of his business on the counter of his shop behind a screen where it was not visible to and could not be seen by customers unless they went behind the counter, which they had no right, and were not allowed, to do. Upon a customer asking to be served with "margarine" the shopkeeper would cut the required portion from the parcel behind the screen and deliver it to such customer in a paper wrapper duly marked with the word "margarine" as required by the Act: Held, that the parcel of margarine being invisible to customers, was not "exposed for sale" within sect. 6 of the Margarine Act, 1887, and so did not

require to be labelled, the words "exposed for sale in that section meaning "exposed" to the view of a purchaser. (*Crane v. Lawrence*. June, 1890. Q. B. Div.) 135.

MARKETS AND FAIRS.—*Penalty for selling tollable articles outside market*—"Prescribed limits"—*Lease by borough corporation to cattle salesman*—*Establishment of market by town council as urban authority*—*Interference with "rights, powers, and privileges"*—38 & 39 Vict. c. 55, ss. 166, 167 (*Public Health Act*, 1875; 10 & 11 Vict. c. 14, ss. 2 and 13 (*Markets and Fairs Clauses Act*, 1847)).—The business of a general auctioneer and cattle salesman was carried on by S. in the borough of Ipswich, in two sale-yards held by him as lessee and under-lessee respectively, under two leases from the corporation containing express covenants for quiet enjoyment. In December, 1890, the corporation, who were also the urban sanitary authority, opened, under the provisions of the Public Health Act, 1875, and the Markets and Fairs Clauses Act, 1847, a market in the borough with a list of tolls and bye-laws. In March, 1891, S. was charged under sect. 13 of the Markets and Fairs Clauses Act, 1847, at the borough petty sessions, on two separate informations, with having sold in his sale-yards, outside the market-place, but within the borough, two bullocks and two horses, for which toll was authorised to be taken in the market, and was convicted and fined: Held, on a case stated, that the conviction was right; that the corporation could not, for their own benefit, deprive themselves as urban sanitary authority of powers given them by statute to be exercised for the public benefit; that S. had no "right, power, or privilege," within the proviso of sect. 166 of the Public Health Act, 1875; and that the limits prescribed in that section by the words "within their district" were "prescribed limits" within the meaning of sect. 13 of the Markets and Fairs Clauses Act, 1847. (*Spurling*, app. v. *Bantoft*, resp. June, 1891. Q. B. Div.) 372.

— *Fair, meaning of*—*Occupier allowing on his land swings, roundabouts, and other contrivances for amusement*—*No buying or selling on land*—*No payment to occupier*—*Walsall Corporation Act* 1890 (53 & 54 Vict. c. cxxx.), s. 126.—Sect. 126 of the Walsall Corporation Act, 1890, imposes a penalty upon any occupier of

land within the borough who "holds or permits to be held any market or fair" thereon, without the licence of the corporation. The defendant, being the occupier of certain land within the borough of Walsall, on certain days (one being a regular fair day), without the licence of the corporation, brought on to his land and used certain swing boats, roundabouts, shooting galleries, and many other contrivances for the amusement of the people. These contrivances were the property of different persons, and it was not proved that such persons made any payment to the defendant for the use of the land, or that there was any buying or selling of goods, or exposing the same for sale thereon. The defendant was convicted under the section of permitting the holding of a "fair" on his land: Held, by Bruce, J., that he ought not to have been convicted, as the word "fair" in the section is used in its proper sense as a mart or gathering for the selling of goods, and would not include gatherings where amusements only were provided: Held, by Lawrence, J., that the defendant was properly convicted, as the word "fair" has a wider meaning than that of a fair in the ordinary sense as a place for buying and selling, and that, although buying and selling are the chief idea in the word, yet that it would include places where amusements of the kind in question were provided, although there was no buying and selling. The junior judge (Bruce, J.) having withdrawn his judgment, the conviction stood. (*Collins*, app. v. *Cooper*, resp. Feb., 1893. Q. B. Div.) 647.

MARRIED WOMAN (MAINTENANCE IN CASE OF DESEPTION) ACT, 1886. See "Husband and Wife."

MASTER AND SERVANT.—*Liability for criminal acts of servant*. See sub "Merchandise Marks Act, 1887."

MATRIMONIAL CAUSES ACT, 1878.—*Appeal*. See sub "Husband and Wife."

MEDICAL PRACTITIONER.—*Registered Licentiate of Society of Apothecaries*, 1885—*Pretending to be M.D., physician, or surgeon*—*Medical Act*, 1858 (21 & 22 Vict. c. 90), s. 40.—A medical practitioner registered as Licentiate of Soc. Apoth. Lond. 1885, but not qualified to be registered as M.D., physician, or surgeon, under the Medical Act, 1858, placed "M.D." after his name on vaccination certificates, and in other ways described

himself to the public as M.D., and as "physician" and "surgeon," in some cases with the further addition of "legally registered practitioner": Held, that he could be convicted of wilfully and falsely pretending to be a doctor of medicine, physician, and surgeon, contrary to sect. 40 of the Medical Act, 1858. (*Reg. v. Baker and another, Justices, and Clarke.* Dec., 1891. Q. B. Div.) 575.

MERCHANDISE MARKS ACT, 1887 (50 & 51 Vict. c. 28), s. 2, sub-sects. (1) and (2), sect. 3, sub-sect. (1, b)—*False trade description*—"Intent to defraud"—*Jurisdiction of magistrates*.—A gunpowder manufacturing company had contracted with Her Majesty's Government to supply 5000 barrels of a certain class of powder known in the trade as R. L. G. 4. There were no stipulations in the contract that the gunpowder should be of the company's own manufacture, or that it should be of English manufacture. The company being unable, through no fault of their own, to fulfil their contract, imported gunpowder from Germany. This gunpowder—which was equal in quality to, and accurately described as, R. L. G. 4—was, on its receipt by the company, taken out of the cylinders in which it was imported and which were labelled "manufactured in Germany," and was placed and supplied to the Government in barrels, to each of which was affixed the following label, "Gunpowder, 110lb. Chilworth Gunpowder Company Limited, R. L. G. 4"; which was the label prescribed by the Government. On a prosecution being instituted, under the Merchandise Marks Act, 1887, against the company on the above facts, the magistrates found that the label was not a "false trade description" within the meaning of the statute, and that there had been no "intent to defraud," and they accordingly dismissed the case:—Held, on appeal, that the label was a "false trade description" within the meaning of sect. 2 of the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), and that there had been an "intent to defraud," in the sense of an intention to mislead the purchaser, and that, therefore, the magistrates ought to have convicted. (*Starey v. The Chilworth Gunpowder Manufacturing Company.* Dec., 1889. Q. B. Div.) 55.

—*Trade mark or description—Application of false trade description—Delivery*

of invoice with the goods—Admissibility of evidence of previous transactions—Master and servant—Criminal liability—Onus of proof—50 & 51 Vict. c. 28, s. 2, sub-sect. 1 (d); s. 3, sub-sect. 1; s. 5, sub-sect. 1 (d), and sub-sect. 3.—The respondent sold and caused to be delivered to the appellant six casks of beer, and at the same time or immediately afterwards delivered to him an invoice describing the six casks as barrels, a barrel meaning, according to the custom of the trade, thirty-six gallons. The appellant, finding that the measure was short, preferred an information against the respondent for unlawfully applying a false trade description contrary to the Trade Marks Act, 1887. The justices were satisfied that short measure had been delivered, but refused to receive evidence of previous short deliveries, and considered that the respondent had no intention to defraud. They held that the delivery of the invoice was not a false trade description within the Act, and dismissed the information, but stated a case: Held (remitting the case), without expressing any opinion whether the justices ought to have convicted or not on the evidence before them, that the delivery of the invoice with the goods might, under the circumstances, be an application of a false trade description within the meaning of the statute; that the justices were wrong in excluding the evidence tendered as to previous short deliveries; and that the old law that a master is not liable criminally for the acts of his servant has not been altered by the Merchandise Marks Act, 1887, with respect to offences thereunder, except that the onus is placed on the defendant of showing that he acted without intent to defraud. (*Budd v. Lucas.* Jan. 24. Q. B. Div.) 248.

METROPOLIS MANAGEMENT ACT.—*Trade refuse.* See sub "Practice."

METROPOLITAN BUILDING ACTS.—*Appeal—Criminal matter.* See sub "Practice."

METROPOLITAN STREETS ACT, 1867.—*Obstruction of highway.* See sub "Highway."

MINES.—*Use of naked lights in coal mine—Offence against Act—Liability of "Owner, agent, and manager"—Managing director appointing a certificated manager—Liability of managing director as "agent"—Reasonable precautions by publishing rules—Coal Mines Regulation Act, 1887* (50 & 51 Vict. c. 58), ss. 49 (r. 8) and 50.—Sect. 50 of the Coal Mines

Regulation Act, 1887, provides that, "in the event of any contravention or non-compliance with any of the general rules . . . by any person whosoever, the owner, agent, and manager, shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the said rules as regulations for the working of the mine, &c." A limited company were the owners of a coal mine of which the respondent was the managing director; but the respondent did not interfere with the actual management of the mine underground, which was left in the hands of a duly certificated manager, under the Coal Mines Regulation Act, who was the manager of the colliery, and was in charge thereof. The respondent, as managing director, occasionally visited the mine, but he had in no way interfered with the manager in his duties, though he had authorised all necessary expenditure for the safety and conduct of the mine, and had duly published at the mine the rules under the Mines Act and the abstract of the Act itself. An offence having been committed by the use of naked lights in the mine on a day when the respondent was not at the mine: Held, (1) that the respondent, as managing director, was "agent" of the mine within the meaning of the Act, and was legally responsible as such; but (2) that he had, by publishing and to the best of his power enforcing the rules as regulations for the working of the mine, taken all reasonable means—within sect. 50 of the Act—to prevent such contravention of the rules, and was therefore not liable to be convicted for the offence. (*Stokes*, Inspector of Mines, app. v. *Checkland*, resp. Feb., 1893. Q. B. Div.) 631.

— *Working shaft—Raising of ore not commenced—Necessity for guides and means of signalling—Metalliferous Mines Regulation Act, 1872* (35 & 36 Vict. c. 77), s. 23, sub-sect. 10.—The respondents, who had completed a shaft in their mine, and were driving a level or tunnel from the same, but had not commenced to raise up any ore by means of the shaft, had not provided guides, nor the proper means of communicating signals from the bottom of the shaft to the surface. An information was laid against the respondents under the Metalliferous Mines Regulation Act, 1872 (35 & 36

Vict. c. 77). s. 23, sub-sect. 10, which enacts that every working shaft of a certain depth shall be provided with guides and proper means of signalling. The justices dismissed the information upon the ground that, as no ore was being raised up the shaft, it was not a working shaft within the meaning of the Act: Held, that the shaft was a working shaft, and that the respondents ought therefore to have been convicted. (*Foster*, app. v. *North Hendre Lead Mining Company Limited*, resps. Oct., 1890. Q. B. Div.) 216.

MISDEMEANOUR.—*Agreement not to sue for sums misappropriated—Compromise of indictment for nuisance.* See sub "Compounding Misdeemeanour."

MISREPRESENTATION.—*Veterinary surgeon—Qualification—"Veterinary forge"—Veterinary Surgeons Act, 1881* (44 & 45 Vict. c. 62), s. 17.—The Veterinary Surgeons Act, 1881, provides that any unqualified person who takes or uses the title of veterinary surgeon or veterinary practitioner, or any name, title, addition, or description stating that he is a veterinary surgeon or a practitioner of veterinary surgery, or of any branch thereof, or is especially qualified to practise the same, shall be liable to a fine. The defendant, who was not a properly qualified veterinary surgeon, carried on the business of a shoeing smith, and had in a prominent place on his business premises and on his bill-heads the words, "J. Robinson. Veterinary Forge": Held, that the defendant had thereby contravened the above provision, as he had held himself out as specially qualified to practise veterinary surgery. (*The Royal College of Veterinary Surgeons v. Robinson*. Feb., 1892. Q. B. Div.) 477.

MURDER.—*Dying declarations.* See sub "Evidence"; see also sub "Attempt to Murder."

NUISANCE.—*Projections from buildings—Metropolis—Articles in front of shop—Projection and obstruction—Liability to penalty in respect of articles so hung out—Michael Angelo Taylor's Act* (57 Geo. 3, c. xxix., s. 65)—*Metropolis Management Act, 1855* (18 & 19 Vict. c. 120), s. 119.—Sect. 65 of Michael Angelo Taylor's Act enacts that if any person (within the metropolis) shall hang out or expose any meat or offal or other matter or thing from any house belonging to or

occupied by him over any part of the pavements or over any area or areas of any houses or other buildings, and shall not remove the same when required to do so, he shall be liable to a penalty of forty shillings. Sect. 119 of the Metropolitan Management Act, 1855, provides that if any projection or obstruction placed against any house or building shall be an annoyance in consequence of the same projecting into or rendering less commodious the passage along any street, then the owner or occupier, on refusing to remove the same, shall be liable to a penalty of five pounds: Held, that sect. 119 of the later Act does not repeal the provisions of sect. 65 of Michael Angelo Taylor's Act as to hanging articles out in front of houses, which provisions are still in force:—Held also, that the offence is committed under sect. 65 of the earlier Act by hanging articles out in front of a house, whether such articles are hung out over highways or not. (*Wyatt, app. v. Gems, resp. June, 1893. Q. B. Div.*) 679.

OATHS ACT, 1888.—*Duty of judge.* See sub "Evidence."

OVERSEERS.—*Breach of statutory duty.* See sub "Indictment."

OYSTERS.—*Close time.* See sub "Fishery Acts."

PARLIAMENT.—*Privilege from committal.* See sub "Bankruptcy."

PERJURY.—*Indictment Evidence in support of averment ambiguous.*—The averment in an indictment for perjury must be proved precisely. In an indictment for perjury the averment stated that the prisoner swore he saw W., "about fifteen minutes after the hour of eleven o'clock in the forenoon" on a particular day, whereas it was proved that he had sworn that he saw W. about a quarter past eleven on the day in question, but had not sworn as to whether it was in the forenoon or in the afternoon. Held, that, the evidence being ambiguous, the averment in the indictment was not proved. (*Reg. v. Bird. Nov., 1891, Day, J.*) 389.

— See also sub "Evidence" and "Practice."

POLICE RATES.—*Standing Joint Committee.* See sub "County Council."

POLITICAL OFFENCE.—*Homicide.* See sub "Extradition."

POST.—*Theft of letters.* See sub "Larceny."

POST OFFICE.—*Unjust scales.* See sub "Weights and Measures."

POUNDBREACH.—*Indictable offence—Cattle seized under warrant of distress for rent and placed in inclosed field—Removal of cattle from field*—It is an indictable offence to remove cattle seized under a distress-warrant for rent and impounded in an inclosed field. (*Reg. v. John Butterfield, sen., and John Butterfield jun. Jan., 1893. Q. B.*) 598.

PRACTICE.—*Appeal—Jurisdiction—"Criminal cause or matter"—Order to abate nuisance—Refusal to state a case—Application for mandamus—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 91. &c.—Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 47.*—The refusal by the Queen's Bench Division of an order nisi for a mandamus to a magistrate to state a case for the opinion of the Court upon a summons under sect. 91 of the Public Health Act, 1875, in respect of a smoke nuisance, is a "judgment of the High Court in a criminal cause or matter," within the meaning of sect. 47 of the Supreme Court of Judicature Act, 1873, from which no appeal lies to the Court of Appeal. (*Rook v. Schofield. July, 1891. Ct. of App.*) 303.

— *Appeal to the Court of Appeal—"Criminal cause or matter"—Rule nisi for mandamus to hear summons under the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49)—Discharge of rule nisi by the Queen's Bench Division—Appeal—Judicature Act, 1873, s. 47.*—The defendants granted a summons upon the application of an inspector, under the Weights and Measures Act, 1878, against a person alleged to have false weights in his possession, but subsequently refused to hear it. A rule nisi was granted against them by the Queen's Bench Division for a mandamus commanding them to hear and determine the summons. The rule was afterwards discharged. Upon an appeal by the prosecutors to the Court of Appeal a preliminary objection was raised by the defendants that the Court had no jurisdiction to hear the appeal:—Held, that this was an appeal from a judgment in a "criminal cause or matter," and that by sect. 47 of the Judicature Act, 1873, the Court had no jurisdiction to hear the appeal. (*Reg. v. Sir F. Young and others. Justices of the County of London. Dec., 1891. Ct. of App.*) 425.

— *Appeal—Court of Appeal—Jurisdiction—Order as to roof of buildings—Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), ss. 19, 45, 46, and 47—“Criminal cause or matter”—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 47.*—W. was summoned before a metropolitan police magistrate for having covered the roof of a building with a combustible material contrary to the provisions of sect. 19 of the Metropolitan Building Act, 1855, and for not having complied with a notice to amend the defect. The magistrate held that the material was “incombustible” within the meaning of the Act, and refused to make an order upon W., but stated a case for the opinion of the Queen’s Bench Division upon that question. By sect. 47 of the Act, if the magistrate had made an order, W. would have been liable to a penalty for every day that he neglected to comply therewith. The Queen’s Bench Division held that the material was not “incombustible.” W. appealed:—Held, that the decision of the Queen’s Bench Division was a “judgment in a criminal cause or matter,” within the meaning of sect. 47 of the Judicature Act, 1873, as to which no appeal would lie to the Court of Appeal. (*Payne, app. v. Wright*, resp. Feb., 1892. Ct. of App.) 460.

— *Appeal—Libel published in newspaper—Order giving leave to commence criminal prosecution—Criminal proceedings—Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 8—Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 50—Rules of Supreme Court, 1883, Order LXVIII., r. 1.*—An order having been obtained from a judge in chambers giving leave to commence a criminal prosecution for libel under sect. 8 of the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), the defendant appealed: Held, that no appeal lies from such an order, as it is an order made in a criminal proceeding. (*Ex parte Pulbrook*. Nov., 1891. Q. B. Div.) 461.

— *Appeal from court of summary Jurisdiction by special case—Refusal of magistrate to state a case—Question of law—Removal of refuse—Ashes—“Trade refuse”—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 125-129—Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33.*—It is provided by the

Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), that the vestries shall appoint persons to remove all dirt, ashes, &c., within their parish; that if the owner of any premises shall require the scavenger to remove the refuse of any trade, such owner shall pay to the scavenger a reasonable sum for such removal; that the justices shall determine whether the matter is or is not the refuse of trade, and the decision of such justices shall be final. The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33, enacts that any person aggrieved who desires to question the order of a court of summary jurisdiction, on the ground that it is erroneous in point of law, may apply to the court to state a case, and, if the court decline to state the case, may apply to the High Court of Justice for an order requiring the case to be stated. The vestry of St. M. refused to remove, unless paid for doing so, the ashes and other refuse produced by furnaces at an hotel within the parish, such furnaces being used for supplying the electric light and other purposes. The manager of the hotel applied to one of the metropolitan police magistrates, who decided that the ashes were not trade refuse, and that the vestry must remove them without extra payment. On behalf of the vestry an application was made to the magistrate to state a case for the opinion of the High Court, but he refused to do so upon the grounds (1) that his decision was final and conclusive, and (2) that no point of law arose in the case: Held, that the decision of the magistrate was not final and conclusive, and that the question whether the ashes were trade refuse or not depended upon the construction and interpretation to be put upon the words of a statute, and was therefore a question of law upon which the magistrate must state a case. (*Reg. v. J. Bridge, Esq.*, Metropolitan Police Magistrate. Feb., 1890. Q. B. Div.) 66.

— *Appeal to quarter sessions against punishment imposed by conviction by court of summary jurisdiction—Sentence of imprisonment—No appearance by respondent—Jurisdiction of quarter sessions to quash whole conviction.*—The respondent was convicted before a court of summary jurisdiction for causing a horse to be cruelly ill-treated, and was sentenced to fourteen days’ imprison-

ment with hard labour. He gave notice of his intention to appeal to quarter sessions upon the ground that the punishment was excessive. No one appeared on behalf of the prosecution at the sessions, and the respondent (the then appellant) having proved the service of his notices of appeal, the court quashed the conviction: Held, that the Court of Quarter Sessions was right in quashing the conviction, as there was no evidence before it upon which it could decide what punishment was right, and it could not leave the conviction standing without some judgment thereon. (*Reg. v. Justices of Surrey and Bell*. Aug., 1892. Q. B. Div.) 547.

PRACTICE.—*Appeal—Order for separation.* See sub "Husband and Wife."

— *Appeal to quarter sessions—Notice.* See sub "Justices."

— *Application for habeas corpus.* See sub "Extradition."

— *Attempt to commit felony—Evidence* —*Not necessary to show that attempt might have been successful.*—In order to prove that an attempt to commit a felony has been committed, it is not necessary to prove that had the attempt not been frustrated the felony could have been committed. *Reg. v. Collins* (33 L. J. 177, M. C.; L. & C. 471) is no longer law. (*Reg. v. Ring and others*. Feb. C. C. R.) 491.

— *Certificate of dismissal—No evidence given.* See sub "Assault."

— *Contempt of court—Summary process—Criminal matter—Appeal—Judicature Act, 1873* (36 & 37 Vict. c. 66), ss. 19, 47.—On an application to the Divorce Court T. was ordered to pay a fine as being guilty of a contempt of Court in publishing in a certain newspaper comments upon the conduct of a party to a divorce suit pending in the High Court of Justice. T. appealed: Held, that the matter was a criminal one, and that, by virtue of sect. 47 of the Judicature Act, 1873, there was no right of appeal. *Reg. v. Barnardo* (61 L. T. Rep. N. S. 547; 23 Q. B. Div. 305) distinguished. (*O'Shea v. O'Shea and Parnell: Ex parte Tuohy*. Feb. 7. Ct. of App.) 107.

— *Conviction—Amendment.* See sub "Highway."

— *Corrupt practices—Prosecution by public prosecutor—Order of Election Court for trial before another Court—Jurisdiction of court to try offence committed in another county—Venue in margin of indictment different from venue in body of indictment—Order for prosecution for a "corrupt practice"—Indictment for a number of corrupt practices—Municipal Elections (Corrupt and Illegal Practices Act, 1884 (47 & 48 Vict. c. 70), s. 28.*—Upon the trial, pursuant to the Municipal Corporations Act, 1882, of a petition against a municipal election, the Court before whom the trial takes place have no power to make an order for the trial, in a county other than that in which the borough is situate, of a charge of bribery alleged to have been committed in such borough during the election. An order of an Election Court for the prosecution of any person for a "corrupt practice" without further specifying the particular offence or offences for which the prosecution is authorised is not bad for want of particularity. Where such an order has been made it is not essential for the validity of an indictment founded upon it that facts sufficient to establish the jurisdiction of the Court to try an offence alleged to have been committed in another jurisdiction should be stated in the indictment. The Municipal Elections (Corrupt and Illegal Practices) Act, 1884, by including a number of corrupt acts in the expression "a corrupt practice" enables prosecutions for all or any of the acts included in such expression, and therefore an order of an Election Court which directs a prosecution for "a corrupt practice" must be interpreted as being intended to authorise a prosecution for some of the corrupt acts included by the Act in such expression, and an indictment which charges any number of such corrupt acts is sufficiently justified by such an order. At the trial of a petition against a municipal election for the borough of Nottingham before a Commissioner appointed pursuant to the Municipal Corporations Act, 1882, an order was made by such commissioner under sect. 28 of the Municipal Corporations (Corrupt and Illegal Practices) Act, 1884, for the trial of certain persons at the assizes at Derby for "a corrupt practice." An indictment which contained a number of counts, each of which alleged a separate and distinct corrupt practice, having

been found by the grand jury at Derby against each of the defendants, and he having pleaded guilty to such indictment, subject to certain questions raised at the trial: Held, upon a case reserved for this Court, that the Election Court had jurisdiction to make the order authorising the prosecution; that the order was sufficient without describing the nature of the corrupt practice in respect of which the prosecution was directed; that it was not necessary, in order to confer upon the Court at Derby jurisdiction to try the case, that the indictment should have been found by a Nottingham grand jury and then remitted to Derby for trial, nor that the indictment should have stated on the face of it the facts which conferred jurisdiction to indict and try in Derbyshire an offence committed in Nottingham; and that the prosecution in Derbyshire of several distinct acts of bribery was sufficiently warranted by the order, although such order merely referred to a "corrupt practice." (*Reg. v. Ripley and Reg. v. Champion*. June, 1890. C. C. R.) 120.

— *Costs—Certiorari—Removal of indictment—Recognisance—Indictment—Several counts—Conviction on some counts, acquittal on others—Taxation of costs—“Acquitted upon the indictment” within meaning of recognisance—16 & 17 Vict. c. 30, s. 5.*—Defendant was indicted at quarter sessions upon one indictment containing several counts, charging various misdemeanours. The indictment was removed by *certiorari*, the prosecutors and sureties being bound over in recognisances, under 16 & 17 Vict. c. 30, s. 5, upon condition to pay the said defendant's costs incurred subsequently to the removal of such indictment. There were seven counts in the indictment. The defendant was acquitted on five counts and found guilty on the two remaining counts. The defendant obtained a rule *nisi*, calling upon the prosecutors to show cause why defendant's costs should not be taxed, the defendant having been acquitted on five out of seven counts in the indictment, the condition of the recognisance being in the terms of 16 & 17 Vict. c. 30, s. 5, viz., that the prosecutor should pay the defendant "in case he or they shall be acquitted" his or their costs incurred subsequently to the removal of the indictment: Held, that the defendant had

not been acquitted upon the indictment within the condition of the recognisance, and therefore the defendant was not entitled to have the costs taxed. (*Reg. v. Bayard*. May, 1892. Q. B. Div.) 572.

— *Costs of prosecution—Subpoenaing infant witness.*—Where the evidence of an infant witness is necessary to support a prosecution, such infant witness should be subpoenaed to appear and give evidence at the trial, and the costs of such subpoena should be allowed. (*Reg. v. Ernest William Smith*. Nov., 1892. Day, J.) 601.

— *Evidence—Admissibility—Murder—Dying declaration—Examination by justice of the peace—Statement giving substance of question and answer—Hopeless expectation of immediate death—Deposition under 30 & 31 Vict. c. 35, s. 6—Increased illness of witness—Stoppage of cross-examination—“Full opportunity of cross-examination”—Admissibility as statement in presence of prisoner.*—Upon an indictment for murder or manslaughter a statement giving the substance of questions put to and answers given by the deceased person is not admissible in evidence as a dying declaration. Such a declaration must, in order that it may be admissible in evidence, be in the actual words of the deceased, and if questions are put, the questions and answers must both be given, in order that it may appear how much was suggested by the examiner, and how much produced by the person making the declaration. Upon the trial of an indictment for murder it appeared that the deceased was told by a doctor that there was little or no hope of recovery, and being asked if she understood her position replied that she did: Held, that there was no proof of a hopeless expectation of immediate death sufficient to make a subsequent declaration admissible in evidence as a dying declaration. During the taking of the deposition of a person dangerously ill under 30 & 31 Vict. c. 35, s. 6, before the prisoner's solicitor had concluded his cross-examination, the witness became so ill that the presiding magistrate stopped the cross-examination: Held, that it was not sufficient that the prisoner should have had such opportunity of cross-examination as the circumstances permitted, and that, as the prisoner had not had full opportunity of cross-exami-

nation, the deposition was, in the absence of any proof that the prisoner was asking vexatious questions in order to defeat the statute, inadmissible in evidence: Held also, that it was inadmissible in evidence as a statement made in the presence of the prisoner, the ground of the admission of such statements in evidence being that where a charge is made against a person in his presence, and he does not deny it, the absence of denial is some evidence of the truth of the charge, whereas, where evidence is being formally taken and the prisoner is represented by a solicitor, it is not to be expected that he will at once deny the statements made, and therefore no presumption arises from the absence of denial. *Reg. v. Mann* (49 J. P. 743) dissented from. (*Reg. v. Mitchell*. March, 1892. Cave, J.) 503.

PRACTICE. — *Evidence — Alibi — Admissibility of evidence of other persons alleged to have been wrongly convicted in former prosecution for the offence.*—Where evidence is given that persons previously convicted of an offence, which is now charged to have been committed by the prisoner at the bar, were in fact the guilty parties, the evidence of such convicted persons, though establishing only their own *alibi*, is admissible. (*Reg. v. Dyche and others*. April, 1890. Hawkins, J.) 39.

— *Evidence—Perjury—Licensed premises—Proof of licence—35 & 36 Vict. c. 94, s. 18.*—On the trial of a charge of perjury alleged to have been committed before justices on the hearing of an information under sect. 18 of the Licensing Act, 1872, against the defendant for being disorderly on and refusing to quit licensed premises, the licence itself must be produced in order to show that the premises were licensed, and, therefore, that the justices had jurisdiction. (*Reg. v. Evans*. March, 1890. Dugdale, Q.C., Commr. Mid. Circ.) 37. See also *sub* "Evidence."

— *Form of conviction—Statement of offence—Defect in substance or form—Power of Court to amend—Justices—Interest—Bias—Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 7—Summary Jurisdiction Act, 1879—11 & 12 Vict. c. 43, s. 1; 12 & 13 Vict. c. 45, s. 7; 42 & 43 Vict. c. 49, s. 39.*—It is provided by the Conspiracy and Protection of Property Act (38 & 39

Vict. c. 86), s. 7, that every person who, with a view to compel any other person to abstain from doing any act which such other person has a legal right to do, wrongfully and without legal authority follows such other person with two or more other persons in a disorderly manner in or through any street shall, on conviction thereof by a court of summary jurisdiction, be liable to payment of a fine or to imprisonment. The defendant was convicted under the above section, but the conviction did not set out the facts from doing which the defendant followed the prosecutor with a view to compel him to abstain—Held, that the conviction was bad. The justices forming the Court which convicted the defendant were shareholders in companies owning ships which were insured in societies, such societies being members of an association of which the prosecutor was an agent:—*Seem*, that the justices were not so interested in the case as to be disqualified upon the ground that they were biased. (*Reg. v. Mackenzie and others*. July, 1892. Q. B. Div.) 542.

— *Joint indictment — Separate trial*
See *sub* "Rape."

— *Habeas corpus—Right of appeal—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 19.*—Sect. 19 of the Judicature Act, 1873, gives no right of appeal from an order of the High Court of Justice granting a *habeas corpus* and discharging the prisoner. Judgment of the Court below reversed. Lords Morris and Field dissenting. (*Bell-Cox v. Hakes and Lord Pensance*. Aug., 1899. H. L.) 158.

— *Indictment—Property—Illegal association — Embezzlement of moneys received on behalf of illegal club—Beneficial ownership of members—24 & 25 Vict. c. 89, s. 4—31 & 32 Vict. c. 116, s. 1.*—The members of an unregistered club having for its object the acquisition of gain by such members, which is illegal owing to non-compliance with the requirements of sect. 4 of the Companies Act, 1862, are the beneficial owners of the property of such club. It is therefore right, in an indictment for stealing or embezzling moneys paid to the treasurer on behalf of such a club, to lay the property in the moneys in the individual members of the club as beneficial owners. (*Reg. v. Tankard*. Dec., 1893. C. C. R.) 719.

— *Indictment — Receiving goods obtained by false pretences* (24 & 25 Vict. c. 96, ss. 88 and 95)—*Necessity for setting out specific false pretences*.—In an indictment under 24 & 25 Vict. c. 96, s. 95, for knowingly receiving goods obtained by false pretences under sect. 88, it is necessary to set out the false pretences by which the goods were obtained. (*Reg. v. Mackay and Ball*. June, 1893. C. C. Ct.) 713.

— *Indictment for unlawful wounding — Special plea of autrefois convict — Conviction for assault before court of summary jurisdiction — Defendant discharged on recognisances for good behaviour*—24 & 25 Vict. c. 100, ss. 42, 45; 42 & 43 Vict. c. 49, s. 16.—A person who has been convicted before a court of summary jurisdiction of an assault which in the opinion of such court was of so trifling a nature as to render it inexpedient to inflict any punishment, or other than a nominal punishment, and who has been discharged upon giving security to be of good behaviour, cannot afterwards be convicted upon an indictment, the charges in which are based upon the same assault. *Semble*, per Hawkins, J., that the giving of security to be of good behaviour was intended by sect. 16 of the Summary Jurisdiction Act, 1879, as a substitution for punishment, and that by giving such security a defendant is placed in precisely the same position as if punishment had been inflicted upon and suffered by him. *Hartley v. Hindmarsh* (14 L. T. Rep. N. S. 795; L. Rep. 1 C. P. 553; 35 L. J. 255, M. C.) distinguished. (*Reg. v. Miles*. Feb., 1890. C. C. R.) 9.

— *Indictment under Criminal Law Amendment Act, 1885, for attempting to defile girl under thirteen, and under 24 & 25 Vict. c. 100, for an indecent assault — Conviction for indecent assault — Admissibility of unsworn testimony of girl to support conviction*—24 & 25 Vict. c. 100, s. 52—48 & 49 Vict. c. 69, ss. 4, 9.—Upon the trial of an indictment, the first count of which charged the defendant, under sect. 4 of the Criminal Law Amendment Act, 1885, with attempting to have unlawful carnal knowledge of a girl under the age of thirteen years; and the second count of which charged him, under 24 & 25 Vict. c. 100, s. 52, with an indecent assault on the girl, her evidence was admitted in support of both charges, although it had not been

given upon oath. The jury having been directed that there was not sufficient evidence to support the charge contained in the first count of the indictment, acquitted the defendant upon such charge, but convicted him of the indecent assault charged in the second count. In order to support the conviction for the indecent assault, the evidence was insufficient unless the evidence which had been given by the girl was admissible: Held, that the proceedings upon each count of the indictment were as separate and distinct as if such counts had been contained in separate indictments, the one charging the defendant with the attempt under the Criminal Law Amendment Act, 1885, the other charging him with the indecent assault under 24 & 25 Vict. c. 100, s. 52; and that, as the first-mentioned Act only rendered the unsworn evidence of the girl admissible in support of the first count of the indictment, it was inadmissible in support of the second count, and the conviction could not therefore be sustained. *Reg. v. Wealand* (58 L. T. Rep. N. S. 782; 16 Cox C. C. 402; 20 Q. B. Div. 827; 57 L. J. 44, M. C.) distinguished. (*Reg. v. Paul*. June, 1890. C. C. R.) 111.

— *Information — Summons — Two offences charged in one summons — Defect only in substance — Summary Jurisdiction Act, 1848* (11 & 12 Vict. c. 43), ss. 1, 10—*Prevention of Cruelty to Animals Act, 1849* (12 & 13 Vict. c. 42), ss. 3, 14.—The defendants were charged upon one information and in one summons under the Prevention of Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 42), s. 3, with unlawfully using a place for the purpose of fighting two dogs, and with encouraging, aiding, and assisting at the fighting of such dogs. It is provided by the Summary Jurisdiction Act, 1848, sect. 1, that no objection shall be taken to any summons for an alleged defect in substance or in form; and by sect. 10 that every complaint shall be for one matter of complaint only, and not for two or more matters of complaint, and every information shall be for one offence only, and not for two or more offences. The objection was taken on behalf of the defendants that the summons was bad upon the ground that the complaint against them was for two matters of complaint: Held, that the objection to the summons was for a defect in sub-

stance only, and must be overruled. (*Rogers v. Richards*. Feb., 1892. Q. B. Div.) 474.

PRACTICE.—*Joint indictment*—No case against one prisoner—Discharge of such prisoner, when the other elects to give evidence—52 & 53 Vict. c. 44, s. 7.—A person jointly indicted with another under 52 & 53 Vict. c. 44, s. 7, but against whom no case is made out, is, nevertheless, not entitled to be discharged at the close of the case for the prosecution where the other person charged elects to give evidence. (*Reg. v. Elizabeth and James Martin*. Dec., 1889. Wills, J.) 36.

—*Joint indictment*—*Separate trial*. See sub "Rape."

—*Jurisdiction of the Vice-Chancellor's Court at Cambridge*—*Spinning-house*—*Charter of the University of Cambridge*, 26th April, 1561—13 Eliz. c. 29, s. 2.—D. H. was arrested at Cambridge by the University constables, and charged before the Vice-Chancellor of the University, with "walking with a member of the University." This charge was read over to her, and she pleaded "not guilty." Evidence was given as to her being seen walking with a gentleman of the University, and also as to her being a woman of bad character. The Vice-Chancellor committed her for fourteen days to the Spinning-house, and the warrant of commitment stated that she had been charged with and convicted of "walking with a member of the University." It appeared that the above was a common form adopted in the Vice-Chancellor's Court when it is intended to charge a woman with walking with such a member for "immoral purposes," and that for a long time it has been taken to mean such a charge, and that it was intended so to charge and convict the said D. H., and so to enter the conviction on the warrant of commitment:—Held, on application for writs of *habeas corpus* and *certiorari*, that the proceedings in the Vice-Chancellor's Court were irregular; that the appellant had not been charged within the words of the charter as "suspected of evil"; that she had been charged with an offence not within the jurisdiction of the Vice-Chancellor; that she had not been charged with any other offence, nor had the charge been altered or amended; and that consequently the conviction was bad. (*Ex parte Daisy Hopkins*. Dec., 1891. Q. B. Div.) 444.

—*Leave to appeal in criminal cases*—*Misdirection*.—Although in special and exceptional circumstances leave to appeal may be granted in criminal cases, the Judicial Committee will not give leave to appeal merely on the ground of misdirection. (*Ex parte Macrea*. May, 1893. Priv. C.) 702.

—*Motion to quash indictment*. See sub "Indictment."

—*New trial*—*Criminal offence*—*Tramway Company*—*Nonpayment of fare by passenger*—*Penalty*—*Summons before magistrate*—*Criminal offence*—*Tramways Act, 1870* (33 & 34 Vict. c. 78), ss. 51, 52, and 56.—By sect. 51 of the Tramways Act, 1870, if any person travelling or having travelled in any carriage on any tramway avoids or attempts to avoid payment of his fare, or if any person having paid his fare for a certain distance knowingly and wilfully proceeds in any such carriage beyond such distance, and does not pay the additional fare for the additional distance, or attempts to avoid payment thereof, or if any person knowingly and wilfully refuses or neglects, on arriving at the point to which he has paid his fare, to quit such carriage, he is liable to a penalty not exceeding forty shillings, which penalty, under sect. 56, may be recovered and enforced in the manner directed by the Summary Jurisdiction Act:—Held, that the acts forbidden by sect. 51 are criminal offences. (*Brown v. The London Tramways Company*. July, 1893. Ct. of App.) 691.

—*Plea of autrefois convict*—*Manslaughter*—*Summary conviction for assault*—42 & 43 Vict. c. 49, s. 27, subsect. 3 (*Summary Jurisdiction Act, 1879*).—Where there has been a summary conviction under the Summary Jurisdiction Act, 1879, for assault, and the person assaulted subsequently dies of injuries caused by the acts constituting the assault, a plea of *autrefois convict* is not a good answer by the person so summarily convicted to an indictment for the manslaughter of the person assaulted. The death of the deceased person is one of the facts constituting the cause for a prosecution for manslaughter. *Reg. v. Morris* (16 L. T. Rep. N. S. 636; L. Rep. 1 C. C. R. 90; 36 L. J. 89, M. C.) followed. (*Reg. v. Friel*. July, 1890. Williams, J.) 325.

— *Private prosecution—Charge dismissed—Prosecutor bound over—Bill preferred by prosecutor—True bill—Case undertaken by Public Prosecutor—Acquittal—Costs of defendants—22 & 23 Vict. c. 17—30 & 31 Vict. c. 35, s. 2—42 & 43 Vict. c. 22, s. 7.*—It is provided by 30 & 31 Vict. c. 35, s. 2, that when an indictment is preferred under 22 & 23 Vict. c. 17, and the person accused is acquitted, the Court may order the prosecutor or other person by or at whose instance such indictment shall have been preferred to pay the costs of the accused person. 42 & 43 Vict. c. 22, s. 7, enacts that, if any person is bound over to prosecute, or has given security for costs, he shall, upon the Director of Public Prosecutions undertaking the case, be released from such obligation, and the Director of Public Prosecutions shall be liable to costs in lieu of such person. Where a person, who was bound over to prosecute a charge under 22 & 23 Vict. c. 17, preferred a bill of indictment, and a true bill was found, the Director of Public Prosecutions undertook the case, and the accused were acquitted. An order having been made that the Director of Public Prosecutions should pay the costs of the persons acquitted: Held, that the order was bad. (*Stubbs v. The Director of Public Prosecutions*. Feb., 1890. Cave and Smith, JJ. Q. B. Div.) 1.

— *Quarter sessions—Continuing court—Consent to tax costs out of sessions.*—A court of quarter sessions is a continuing court, and may determine the effect of an order made at a previous sessions. Where nothing has been said to the contrary, consent to tax the costs of an appeal to quarter sessions out of sessions may be implied from the universal custom so to do. (*Midland Railway Company v. Edmonton Union*. Nov., 1893. Q. B. Div.) 731.

— *Res judicata—Dismissal of charge on first hearing a bar to subsequent consequent conviction—“Nemo bis vexari debet”—The Dogs Act, 1871 (34 & 35 Vict. c. 56), s. 2.*—The appellant was charged with non-compliance, on the 21st day of August, 1889, and ten days thereafter, with an order made by justices under sect. 2 of the Dogs Act, 1871, requiring him to keep a dangerous dog under proper control. No evidence was given to support the charge except as to the 21st day of August, and the charge

was dismissed on the ground that the offence had not been made out. Subsequently the appellant was charged with not keeping the dog under proper control on the 21st day of August simply: this charge was proved and the appellant was convicted: Held (quashing the conviction), that, as the appellant was put in peril and might have been convicted on the first hearing, the matter was *res judicata* on the second hearing, and the maxim *Nemo bis vexari debet* applied. (*Riley, app. v. Brown*, resp. March, 1890. Q. B. Div.) 79.

— *Service of summons.* See sub “Bastardy.”

— *Several offences on same day.* See sub “Apothecary.”

— *Summary proceedings—Alternative offences alleged in same information—Validity of conviction.*—A driver of a steam tramcar was prosecuted and convicted for having permitted smoke to escape from his engine “contrary to the bye-laws of the Board of Trade, made for the regulation of traffic on the said company’s lines.” The bye-law in question provided that “no smoke or steam shall be emitted from the engines so as to constitute any reasonable ground of complaint to the passengers or the public” under a penalty: Held, that the bye-law created offences in the alternative, and that as the information and conviction did not set forth distinctly with which of these alternative offences the defendant was charged, the conviction was bad. (*Cotterill, app. v. Lempriere*, resp. March, 1890. Q. B. Div.) 97.

— *Verdict—Inconsistent findings.* See sub “False Pretences.”

PREVENTION OF CRUELTY TO ANIMALS ACT. See sub “Cruelty to Animals.”

PROSECUTION.—*Agreement to stifle.* See sub “Stifling Prosecution.”

PROSECUTION OF OFFENCES ACT.—*Refusal to disclose source of information—Public Prosecutor.* See sub “Evidence.”

PUBLIC HEALTH ACT, 1875.—See sub “Unsound Meat.”

PUBLIC POLIOY.—*Illegal agreement.* See sub “Stifling Prosecution.”

PUBLIC PROSECUTOR.—*Order for costs on.* See sub “Practice.”

QUARTER SESSIONS—*Appeal*. See sub "Justices" and sub "Practice."

— *Taxation of costs*. See sub "Practice."

RAPE.—*Indictment of female—Practice—Joint indictment—Husband and wife—Felony—Separate trial*.—A woman may be indicted for rape as a principal in the second degree. There is no right to a separate trial in cases of a joint indictment. It is solely a matter for the discretion of the court. (*Reg. v. Ram and Ram*. March, 1893. Bowen, L.J.) 608.

REGISTRATION ACTS.—*Non-compliance by overseers with—Voters' lists*. See sub "Indictment."

RES JUDICATA. See "Practice."

SALE OF FOOD AND DRUGS ACTS.—*Adulteration of food—Admissibility of evidence as to the article sold being inclosed by mistake in a wrong wrapper—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6*.—E. W., in the employment of and at the request of the respondent, entered a shop belonging to the appellants and asked for some lard. He was served with it by the shop assistant, and then handed it to the respondent, who informed the shop assistant that it was bought for the purpose of analysis. The assistant then noticed that he had inclosed the lard in a wrapper labelled "margarine," and pointed out the mistake. A summons was taken out under sect. 6 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), and on the hearing of the charge evidence was called and tendered on behalf of the appellants that in the hurry of the business and by mistake, their assistant had put the lard in a wrapper marked "margarine" instead of "lard compound," and that such an act was contrary to the express instructions of the appellants. The justices refused to admit such evidence, and convicted and fined the appellants: Held, that the conviction must be quashed, for the evidence tendered and refused was admissible and material. (*Kearley and another v. Tylor*. June, 1891. Q. B. Div.) 328.

— *Adulteration of food—Alteration of article—Milk—Abstraction of fat—Sale of milk from which fatty matter has been abstracted—Absence of guilty knowledge—Conviction of the seller—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 9*.—Milk purchased at the shop of the

defendant proved on analysis to be deficient in cream to the extent of 33 per cent. The milk having been received pure and good from the country had been placed in a large vessel, from which it was served out in small quantities as occasion required. The respondent urged that it was the natural tendency of the fatty matter to rise to the top, and that the quality of the milk therefore necessarily diminished as time went on and the upper portion, containing more than its due proportion of cream, was removed. The magistrate having accepted this excuse, and having refused to convict under sect. 9 of the Sale of Food and Drugs Act, 1875: Held (allowing the appeal), that an offence had been committed within that section, the object of the Act being to protect the buyer; and that therefore upon proof of the sale of an article of food from which an element has been abstracted, the intention of the abstractor is immaterial and his ignorance of the abstraction affords no excuse. (*Pain v. Boughtwood* (16 Cox C. C. 747; 62 L. T. Rep. N. S. 284; 24 Q. B. Div. 353) approved. (*Dyke v. Gover*. Dec., 1891. Q. B. Div.) 421.

— *Adulteration of food—Contract to supply milk containing specified proportion of cream—Deficiency of cream in the milk supplied—Information laid by inspector of weights and measures against consignor—Conviction of consignor by justices—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 9—Sale of Food and Drugs Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 3*.—Under a contract with the guardians of the West Derby Union the appellant undertook to supply them with a specified quantity of milk daily at a certain price, and the milk was to be tested upon delivery, and a reduction in the price was to be made if it appeared that the milk was deficient in a certain specified proportion of cream. On the 28th day of October, 1890, the appellant delivered five cans of milk at the workhouse, from each of which a sample was taken by the respondent, an inspector of weights and measures. Two of these samples having been found, on analysis, to be deficient in cream, the appellant was summoned, convicted, and fined: Held (affirming the decision of the justices), (1) that the respondent, the inspector of weights and measures, was justified in laying two informations, notwithstanding there

was, as between the appellant and the guardians of the union, only one sale; (2) that the respondent was right in taking a sample from each of the five different cans; (3) that the appellant was not entitled to give in evidence the analysis of the milk contained in the three cans in respect of which no information had been laid; and (4) that his contract with the guardians of the West Derby Union could not affect his liability on informations laid by an inspector of weights and measures. (*Fecitt*, app. v. *Walsh*, resp. April, 1891. Q. B. Div.) 322.

Adulteration—Definition of food—Sale of baking powder containing injurious ingredient.—Baking powder is not an article of food or an article used for food within sect. 2 of the Food and Drugs Act, 1875; and the seller of a baking powder composed of bicarbonate of soda (20 per cent.), alum (40 per cent.), and powdered rice (40 per cent.), cannot be convicted under sect. 3, although one of the results of the chemical action between the alum and the bicarbonate of soda is to leave in the bread, &c., into which the baking powder has been introduced, a residue of hydrate of alumina, a substance which is injurious to the health of man. (*Jones*, app. v. *James*, resp. Jan., 1894. Q. B. Div.) 725.

Adulteration of food—Division of sample—Submission of sample to public analyst—Half of sample only sent to be analysed—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 6, 13, 14, 15—Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 3.—The appellant, an inspector of nuisances, obtained samples of milk consigned by the respondent. He divided each sample into two parts, retaining one in his own possession, and sending the other to the public analyst: Held (following *Rouch v. Hall*, 44 L. T. Rep. N. S. 183; 6 Q. B. Div. 17), that the inspector had submitted a sample within sect. 3 of the Act of 1879 (42 & 43 Vict. c. 30), and that the respondent might therefore rightly be convicted. (*Rolfe*, app. v. *Thompson*, resp. June, 1892. Q. B. Div.) 551.

Adulteration of food—Milk—Sale of Food and Drugs Acts, 1875, 1879 (38 & 39 Vict. c. 63, ss. 6, 14; 42 & 43 Vict. c. 30), s. 3—Amendment of summons—Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43),

s. 1.—A consignor of milk having been summoned under sect. 6 of the Sale of Food and Drugs Act, 1875, the evidence against him disclosed an offence under sect. 3 of the Amendment Act, 1879: Held, that the variance was curable by sect. 1 of the Summary Jurisdiction Act, 1848, and that the appellant was rightly convicted. (*Hiett*, app. v. *Ward*, resp. Feb., 1894. Q. B. Div.) 736.

Adulteration of food—Milk—Contract to supply—Label attached to churn—Written warranty—38 & 39 Vict. c. 63, ss. 6, 25.—By sect. 25 of the Sale of Food and Drugs Act, 1875, "if the defendant in any prosecution under this Act prove to the satisfaction of the justices that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect," he shall be discharged from the prosecution. Upon the hearing of an information against the appellants for having sold certain milk to the respondent which was not of the nature, substance, and quality demanded by him, viz., 20 per cent. of its original fat having been abstracted, the appellants proved that they purchased the milk under a contract by which the Higham Company agreed to supply them daily with a certain quantity of "genuine good new milk of the best quality with all its cream on," and by which the vendor warranted each supply of milk to be pure, genuine, and unadulterated, and that attached to the churn which contained the milk of which the milk in question was part, was a label bearing the words "warranted genuine new milk with all its cream on." Held, that the contract and the label together constituted a written warranty within the meaning of the above section. (*The Farmers and Cleveland Dairies Company Limited*, apps., v. *Stevenson*, resp. Oct., 1890. Q. B. Div.) 201.

Adulteration of food—Milk—Contract to supply—Purchaser paying carriage from place of consignment—"Place of delivery" within sect. 3 of the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30).—Sect. 3 of the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30) provides that the inspector "may procure at the place of delivery any sample of milk

in the course of delivery to the purchaser" for the purpose of making an analysis of the same. The appellant, a farmer, who had entered into an agreement to supply milk to a dairy company, to be "delivered at Hull," and the purchasers to pay the carriage, consigned two churns of milk from C. to the purchasers at Hull, where on its arrival at the station samples were taken by the respondent, and on analysis were found to be adulterated. The appellant was convicted and fined: Held, that the conviction was right; that Hull was the place of delivery, and not C., although the purchasers had paid the carriage of the milk from the latter place. (*Filshie*, app. v. *Evington*, informant. Feb., 1892. Q. B. Div.) 481.

SALE OF FOOD.—Adulteration of food—Milk
—Particulars of offence—Sale of Food and Drugs Acts, 1875, 1879 (38 & 39 Vict. c. 63, s. 6; 42 & 43 Vict. c. 30), s. 10.—Sect. 10 of the Food and Drugs Act Amendment Act, 1879, provides that in all prosecutions under the Sale of Food and Drugs Act, 1875, there shall be stated on the summons to appear before the magistrate "particulars of the offence or offences against the said Act of which the seller is accused." A summons was served on the appellant, in which it was stated that he "on the 30th day of June, 1892, at Salford, in the borough aforesaid, did then and there sell to Henry Rider" (the respondent), "and to the prejudice of Henry Rider, one pint of milk, which was not of the nature, substance, and quality of the article demanded by such purchaser." Held (reversing the decision of the magistrate), that the appellant could not be convicted, as the summons did not sufficiently state the particulars of the offence of which he was accused to meet the requirements of sect. 10; that the defect could not be cured by an oral communication to the appellant of the nature of the adulteration complained of; and that the appellant having appeared before the magistrate only to protest against his jurisdiction was not debarred from setting up the insufficiency of the particulars. (*Barnes*, app. v. *Rider*, resp. Oct., 1892. Q. B. Div.) 623.

— **Adulteration of food—Milk—Water added by servant employed to sell—Conviction of master — Non-connivance of**

master no defence—38 & 39 Vict. c. 63 (Sale of Food and Drugs Act, 1875), s. 6
 —The servant of a milk salesman, employed by his master to sell milk adulterated it with water. The master was convicted as the seller of the adulterated milk under sect. 6 of the Sale of Food and Drugs Act, 1875, and fined the full penalty of 20l.: Held, that the conviction was right, whether the master did, or did not, connive at the offence, although the entire absence of connivance on his part might, in the discretion of the convicting magistrate, be a ground for a mitigation of the penalty. (*Brown*, app. v. *Foot*, resp. Jan., 1892. Q. B. Div.) 509.

— **Adulteration of food—Skimmed milk sold as condensed milk—Label on article**
 — **Disclosure of alteration — Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6, 7, and 9.**—By sect. 6 of the Food and Drugs Act, 1875, it is provided that "No person shall sell to the prejudice of the purchaser any article of food &c., which is not of the nature, substance, and quality of the article demanded," &c. By sect. 7, "No person shall sell any compound article of food &c., "which is not composed of ingredients in accordance with the demand of the purchaser," &c. By sect. 9, "No person shall with the intent that the same may be sold in its altered state without notice, abstract from any article of food any part of it so as to affect injuriously its quality, substance, or nature, and no person shall sell any article so altered without making disclosure of the alteration under a penalty in each case," &c. The respondent sold to the appellant a tin of skimmed milk which purported to be, and was sold as marked upon a label upon the tin "Condensed Milk." On another part of the label, in smaller print it stated that "this tin contains skimmed milk." As to whether there had been a sufficient disclosure within the meaning of sect. 6 of the Food and Drugs Act: Held, that the label on the tin was a disclosure of the contents of the tin, and the appeal was dismissed. (*Jones*, app. v. *Davis*, resp. June, 1893. Q. B. Div.) 694.

— See also sub "Justices."

SALMON FISHERY ACTS. See sub "Fishery Acts," sub "Fishery Board," and sub "Justices."

SCHOOL BOARD.—*Imprisonment of member of board for "crime"*—*Criminal conspiracy in Ireland*—*Conviction by court of summary jurisdiction*—*Vacating office*—*Elementary Education Act, 1870* (33 & 34 Vict. c. 75), *sched. 2, part 1, r. 14*—*Criminal Law and Procedure (Ireland) Act, 1887* (50 & 51 Vict. c. 20).—Rule 14 of *sched. 2, part 1, of the Elementary Education Act, 1870*, provides that, "if a member of the School Board . . . is punished by imprisonment for any crime . . . such person shall cease to be a member of the School Board, and his office shall thereupon be vacant." The plaintiff, who was a member of a school board, was found guilty, in Ireland, by a court of summary jurisdiction holden under the provisions of the Criminal Law and Procedure (Ireland) Act, 1887, of having taken part in a criminal conspiracy to interfere with the administration of the law, and suffered imprisonment without hard labour for such offence:—Held, that the offence for which the plaintiff had been punished was a "crime" within the meaning of the above rule, and that the plaintiff having suffered punishment by imprisonment for such crime, thereby ceased to be a member of the board, and his office had become vacant. (*Conybeare v. The London School Board*. Oct., 1890. Q. B. Div.) 191.

SOLICITING TO CONSPIRE TO CHEAT. See "Conspiracy to Cheat and Defraud."

SPECIAL CASE. See sub "Justices."

—— *Question of law.* See sub "Practice."

—— *Refusal to state.* See sub "Practice."

SPINNING HOUSE.—*Vice-Chancellor's jurisdiction.* See sub "Practice."

STANDING JOINT COMMITTEE.—*Police rates.* See sub "County Council."

STATUTORY DUTY.—*Breach of a specific remedy.* See sub "Indictment."

STIFLING PROSECUTION.—*Agreement—Validity—Execution of deed—Public policy.*—An action was brought by a married woman to set aside a mortgage of her property to the defendants, who were the trustees of a land society, to secure money which had been misappropriated by her husband, who was the secretary of the society, on the ground that the security was given under threats of a criminal prosecution against her

husband: Held, that the burden was on the plaintiff to prove pressure or undue influence, neither of which had been substantiated; and that consequently her action could not be maintained. *Williams v. Bayley* (14 L. T. Rep. N. S. 802; L. Rep. 1 E. & I. App. 200) explained. Decision of Kekewich, J. (63 L. T. Rep. N. S. 376) reversed. (*McClatchie v. Haslam*. Dec., 1891. Ct. of App.) 402.

—— *Agreement—Validity—Illegal consideration.*—C., the secretary of a building society, misappropriated various sums received by him in that capacity. Upon those frauds coming to the knowledge of the directors of the society they required C., under threats of criminal proceedings for embezzlement, to make good his defalcations by a specified day. C. then applied to the plaintiffs, who were his relatives, for assistance, and mentioned that he was in danger of being prosecuted. The plaintiffs thereupon gave a written undertaking to the society to make good the greater part of the debt due from C., the expressed consideration being the forbearance of the society to sue him for the amount for which the plaintiffs made themselves responsible. In pursuance of that undertaking the plaintiffs gave two promissory notes to the society, and deposited certain deeds with it as collateral security. The plaintiffs in giving the undertaking were actuated by the desire to prevent the prosecution, and this was known to the directors of the society. The plaintiffs brought an action against the society for a declaration that the promissory notes and the deposit of deeds were void, on the ground that they were given upon an illegal consideration: Held, that the consideration for the agreement being the forbearance of the society to take criminal proceedings against C. was illegal; that the agreement which was founded upon it was therefore void; and the plaintiffs were entitled to succeed in their action. Decision of Williams, J. (*ante*, p. 334; 65 L. T. Rep. N. S. 314; (1891) 2 Ch. 587) affirmed. (*Jones v. The Merionethshire Permanent Benefit Building Society*. Dec., 1891. Ct. of App.) 389.

—— See also sub "Compounding Misdemeanour."

SUMMARY JURISDICTION. See sub "Justices."

SUMMARY PROCEEDINGS.—*Alternative offences.* See sub "Practice."

SUMMONS.—*Two or more offences.* See sub "Practice."

TRADE DESCRIPTION. See sub "Merchandise Marks Act."

TRADE REFUSE.—*Removal of ashes.* See sub "Practice."

TRADE UNION.—*Meaning of term.* See sub "Intimidation."

TRIAL BY JURY.—*Right to claim.* See sub "Justices."

UNLAWFUL AND CARNAL KNOWLEDGE. See sub "Criminal Law Amendment Act" and sub "Evidence."

UNLAWFUL ASSEMBLY.—*Assembly of persons for lawful object—Commission of acts likely to lead to breach of the peace—Ignorance as to effect of so doing—Sufficiency of evidence to support conviction.*—The marching of nine men, carrying with them musical instruments, upon a Sunday through the public streets of a town (in which town processions other than those of Her Majesty's naval, military, and volunteer forces are prohibited from taking place on Sunday, if accompanied by instrumental music) is no evidence of an unlawful assembly (although the so marching is calculated to and does excite others to the commission of a breach of the peace, if such men do not know that these acts were calculated to lead to a breach of the peace. But, *quere*, whether where two or more persons are assembled together in pursuit of a common object, lawful in itself, and in the carrying out of such object do something which may lead to a breach of the peace (or which is calculated to lead others to believe that a breach of the peace will be committed), such assembly does not amount at common law to an unlawful assembly. (*Reg. v. Clarkson and others.* Jan. 1892. C. C. R.) 483.

UNLAWFUL WOUNDING.—*Conviction for assault—Plea of autrefois convict.* See sub "Practice."

UNSOOUND MEAT.—*Exposure for sale—Seizure before exposure—Meat prepared for sale—Liability of person in whose possession same found—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 116, 117.*—The respondent, a butcher, pur-

chased a cow, which he knew to be unfit for the food of man. He slaughtered the beast, and was about to dress it for human food, when it was seized by an inspector of nuisances and condemned by a justice as unfit for the food of man. An information was laid against the respondent for having the unsound meat in his possession for the purpose of preparation for sale and intended for the food of man. The justices dismissed the information on the ground that the respondent had not actually exposed the meat for sale: Held, that the justices were wrong, as a person who has unsound meat in his possession with the intention of selling the same for the food of man is guilty of an offence under sect. 117 of the Public Health Act, 1875, although he may not have actually exposed the meat for sale. *Vinter v. Hind* (48 L. T. Rep. N. S. 359; 10 Q. B. Div. 63) distinguished. (*Mallinson, app. v. Carr*, resp. Oct., 1890. Q. B. Div. 220.

VACCINATION.—*Order for—Non-compliance—Summary proceedings—Authority of vaccination officer—Further proceedings—Regulations of the Local Government Board 1874, art. 16—Vaccination Act, 1867 (30 & 31 Vict. c. 84), s. 31.*—B., a vaccination officer, acting under the directions of and on behalf of the Reigate Board of Guardians, obtained an order requiring K. to have his child vaccinated. K. failed to comply with this order, whereupon B. summoned him before the justices under sect. 31 of 30 & 31 Vict. c. 84, requiring him to show some reasonable grounds for his omission to carry the said order into effect. The justices refused to make any order on the ground that it was necessary for B. under sect. 31 of the Vaccination Act, 1867, and art. 16 of the Local Government Board Regulations, 1874, before taking out the summons on K.'s non-compliance with the order made on him to have reported the matter to the board of guardians and to have obtained their further instructions, and that there was no evidence before them that he had done so. Held, that the words "further proceedings" in art. 16 of the Local Government Board Regulations, 1874, do not apply to proceedings taken under sect. 31 of the Vaccination Act, 1867, for the imposition of a penalty on non-compliance with a vaccination order, except where a penalty has already been im-

posed and it is sought to impose a fresh penalty in respect thereof. (*Reg. v. Brocklehurst and others*. Nov., 1891. Q. B. Div.) 409.

— *Justices—Repeated fines—Previous conviction—Fresh order of justices necessary each time—Vaccination Act, 1867* (30 & 31 Vict. c. 84), ss. 29, 31—*Vaccination Act, 1871* (30 & 31 Vict. c. 84), ss. 20, 81—*Vaccination Act, 1871* (34 & 35 Vict. c. 98), s. 11.—A question was raised under the Vaccination Act, 1867 (30 & 31 Vict. c. 84) as to whether repeated fines can be imposed on a person for continued disobedience to an order to vaccinate a child. Sect. 31 of the Vaccination Act, 1867, provides as follows: "If the information be given to a justice that a child under the age of fourteen years has not been successfully vaccinated, and that notice has been given to the parent of such child to procure its being vaccinated, and this notice has been disregarded, the justice may summon such parent to appear with the child before him, and if the justice shall find upon examination that the child has not been vaccinated, he may, if he thinks fit, make an order directing the child to be vaccinated within a certain time; and if at the expiration of such time the child shall not have been vaccinated, the person upon whom such order shall have been made shall be proceeded against summarily, and unless he can show some reasonable ground for his omission to carry the order into effect, shall be liable to a penalty, &c." Held, that after conviction it is necessary to obtain another order for the vaccination of the child, before the parent can be again fined for disobedience. (*Reg. v. Sir Wm. Pink and others*, Justices of Portsmouth. Feb., 1892. Q. B. Div.) 523.

VAGRANCY.—See sub "Gaming."

VALUABLE SECURITY.—*Bill of exchange*. See sub "Larceny."

VERDICT. — *Inconsistent findings*. See sub "False Pretences."

VETERINARY SURGEONS. — *Qualification*. See sub "Misrepresentation."

VEXATIOUS INDICTMENTS ACTS. — See "Practice."

WEIGHTS AND MEASURES.—*Bread—Sale otherwise than by weight—Conviction—6 & 7 Will. 4, c. 37, ss. 4 and 7—52 & 53*

Vict. c. 21, s. 32.—A customer was served with a loaf of bread by the appellant's son from a cart belonging to the appellant and of which the son was in charge. The loaf was not weighed at the time of sale thereof nor did the purchaser require that such should be done, but it was afterwards found to be of short weight. The appellant was convicted under sect. 4 of 6 & 7 Will. 5, c. 37, which provides that bread shall not be sold otherwise than by weight: Held, that the conviction was right and that the Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), as affecting 6 & 7 Will. 4, c. 37, only applies to sect. 7 of that Act, and only to such part of such section as relates to a baker refusing to weigh bread purchased of him. (*Copeland v. Walker*. June, 1891. Q. B. Div.) 331.

— *Post-office—Postmaster carrying on other trade requiring weights and scales—Post-office scale unjust—Right of inspector to seize—Jurisdiction of justices—Weights and Measures Act, 1878* (41 & 42 Vict. c. 49), ss. 25, 59.—A postmaster, who also carried on the business of a bakery, was summoned, under sect. 25 of the Weights and Measures Act, 1878, for having in his possession for use for trade an unjust scale; this scale was supplied by, and was the property of, the Postmaster-General, and was on the same counter as that on which the bread was sold. There were in the shop no weights or scales suitable for the weighing of bread except the Post-office weights and scales, though by statute it was necessary to sell the bread by weight, and to have weights for that purpose. There was no suggestion that the postmaster knew that the scale was unjust, or that he had used it for the purposes of his trade: Held (making absolute a rule for a prohibition), that Post-office weights and measures, supplied by the Post-office for post-office purposes, are not within the operation of the Weights and Measures Act, 1878, and that consequently the justices had no jurisdiction to enter on the inquiry. (*Reg. v. The Justices of Bromley*. Dec., 1889. Q. B. Div.) 61.

— *Sale of coal in sacks—Weighing same on delivery—Representation of weight by seller's servant—Liability of seller—Short weight—52 & 53 Vict. c. 21, s. 29* (1) (2).—The respondent, a greengrocer and coal dealer, was in the habit of

having coal brought to his premises in sacks, which were weighed in the presence of his servant and left on the premises for the purpose of sale and delivery to his customers. Having received orders for 5cwt. of coal, the respondent directed his servant to deliver the same to customers who had ordered them. The servant accordingly took five sacks of coal, believing each sack to contain 1cwt., and placed them in his master's cart, and whilst on his way to deliver them to the customers he was stopped by an inspector of the London County Council, the local authority, who asked him what weight each sack contained, to which he replied "1cwt." On being weighed by the inspector, a de-

ficiency was found in the weight of four of the sacks: Held, that the respondent, the seller of the coal, was not liable under sect. 29, sub-sect. 2, of the Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), as there was no representation by him of the weight, and that the servant was not liable, as he was not the seller of the coal. *Mullins v. Collins* (L. Rep. 9 Q. B. 292; 43 L. J. 67, M. C.) referred to and distinguished. (*Roberts, app. v. Woodward, resp. July, 1890. Q. B. Div.*) 139.

WEIGHTS AND MEASURES. — *Absence of penalty. See sub "Justices."*

— *Appeal. See sub "Practice."*

WITNESS. *See sub "Evidence."*

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